Supreme Court, U.S.
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No. 07-492

IN THE

Supreme Court of the United States

ONESIMPLELOAN, CARINA D. BALL AND NATHAN BAZYK,

Petitioners,

v.

U.S. SECRETARY OF EDUCATION, SECRETARY'S REGIONAL REPRESENTATIVE FOR REGION II,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns the first time that the federal Judiciary has authorized a violation of the Bicameral and Presentment Clauses of the U.S. Constitution, Article I, § 7. Here, with one party in the majority in the House of Representatives and Senate, senior members in the Executive and Legislative Branches — faced in 2006, with hotly contested Bills comprised of appropriations, budget and other legislation whose non-identical texts squeaked by each house of Congress by a one vote margin in each[1] — chose to circumvent Article I, § 7 by having two Congressional officials and the Executive sign into Law the Senate version that did not pass in identical form in the House of Representatives.[2] The signers hoped that the Judiciary would vouchsafe this approach, with the Executive Branch planning to tell the Judiciary that it lacks power to enforce the Constitution because of a 19th Century judge-made "enrolled bill rule" of evidence that this Court announced in the Journal Clause case of

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[1] The so-called Deficit Reduction Omnibus Reconciliation Act of 2005, P.L. 109-171 (the "DRA") emerged from non-identical texts, one passing in the Senate by a tie-vote broken by the Vice President, and the other passing in the House by a vote of 216 to 214. In an effort to cure the resulting constitutional defect, the Senate passed a concurring resolution to approve the DRA (S. Con. Res. 80, 109th Cong. (2006)), but which the House of Representatives did not pass.

[2] A legislative text signed by the Speaker of the House and the Vice President or the Speaker *pro tem* of the Senate, presented to the President for signature, is called an "enrolled bill." *Field v. Clark*, 143 U.S. at 672-73.

Field v. Clark, 143 U.S. 649 (1892). *See also* U.S. CONST. ART. I, § 5. The gambit worked.[3]

The Court of Appeals, while inviting this Court to revisit the "enrolled bill rule," erroneously stated that "we conclude that the holding of *Marshall Field* is directly on point and that the Supreme Court has not overruled or narrowed that holding. Moreover, absent Supreme Court direction, we may not reassess the need for an enrolled bill rule or create exceptions to that rule on the basis of technological and political developments since *Marshall Field* was decided." Pet. App. 2a. The result of the Judiciary's knowing turn of a blind eye to a blatant violation of the Bicameral and Presentment Clauses sets an extraordinarily dangerous precedent. *Realpolitik* behavior and temptations extend across time. The realization that no enforceable Constitutional requirement exists that identical texts must pass both Houses of Congress will inexorably tempt repetition of this unconstitutional behavior whenever again one party has the pragmatic power to invoke the "enrolled bill rule" to enact a putative Law.

This Court's modern federal constitutional jurisprudence holds that a Bill becomes a Law *only* after three mandatory steps are taken. Specifically, "(1) a bill containing its exact text was approved by a majority of

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[3] The Court of Appeals ruled below that "faced with allegations that a law is unconstitutional because both houses of Congress did not pass identical bills, a court may not look beyond the version of the bill authenticated by the signatures of the presiding officers of the House of Representatives and Senate." Pet. App. 2a. The D.C. Circuit ruled likewise in *Public Citizen v. Clerk*, 486 F.3d 1342, 1350 (D.C. Cir. 2007).

the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President." *Clinton v. City of New York*, 524 U.S. 417, 448 (1998). If any of the text differed "at any one of those three stages," a Law "would not have been validly enacted." *Id.*; *see* U.S. CONST. ART. I, § 7. The Court of Appeals also acknowledged this Court's opinion in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), which explicitly held that "[w]here, as here, a constitutional provision is implicated, *Field* does not apply," 495 U.S. at 391 n.4. Treating the "enrolled bill rule" as an exception to the bedrock principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is," and that "[a law] repugnant to the constitution, is void," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), the Court of Appeals held that *Field* and *Munoz-Flores* collectively mean that the Judiciary will look beyond the face of an enrolled bill only in constitutional challenges made under the first sentence of Article I, § 7 (Origination Clause), which was the specific factual context of *Munoz-Flores*, but not in challenges made under its second sentence (Bicameral and Presentment Clauses) or under Section 9 (Appropriations Clause). That result is especially anomalous, because unlike the Origination Clause, the Bicameral and Presentment Clauses are lynchpins of the constitutional scheme of checks and balances.

The questions presented for review are:

Does a Bill become a Law that the Judiciary must uphold even though its exact text has not received approval by a majority of the Members of the House of

Representatives, the approval by the Senate of precisely the same text, and the signing of that identical text into law by the President?

If, despite this Court's holding in *Munoz-Flores* that "[w]here, as here, a constitutional provision is implicated, *Field* does not apply," *Field* continues to bind the lower courts such that the Judiciary may adjudicate constitutional compliance with Article I, § 7's first sentence (the Origination Clause) but may not adjudicate compliance with its second sentence (the Bicameral and Presentment Clauses) or with Article I, § 9 (the Appropriations Clause), should *Field* be overruled or narrowed so as not to apply in such cases because the most important function of this Court is to uphold the Constitution?

May a plaintiff, who is personally, concretely, substantially and economically injured by a putative Law, challenge it as unconstitutional for being enacted without a Bill containing its exact text having been approved by a majority of the Members of the House of Representatives; the Senate having approved precisely the same text; and that text having been signed into law by the President? Here, two education loan borrowers, whom the DRA deprived of their statutory right to refinance their substantial federal consolidation loans, and a lender whom the DRA deprived of its business of federal loan consolidation, suffered personally, concretely, substantially and economically from the DRA and sued to declare it unconstitutional.

CORPORATE DISCLOSURE STATEMENT

Petitioner OneSimpleLoan (a private non-governmental party) certifies that it is a corporation incorporated under the laws of the State of Florida under the name American Leads Unlimited, Inc., it does business as OneSimpleLoan, an assumed name under the laws of the State of Florida, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 496 F.3d 197 (2d Cir. 2007), and is reproduced at pages 1a to 26a of the Appendix. The district court's two opinions are not officially reported, but one of them is unofficially reported at 2006 U.S. Dist. LEXIS 38714 and at 2006 WL 1596768, and both decisions are reproduced at pages 27a to 57a of the Appendix.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254. The Court of Appeals entered its judgment on July 19, 2007. This petition is filed within ninety days of that date. No rehearing was requested.

CONSTITUTIONAL PROVISIONS INVOLVED

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . . ." U.S. CONST. ART. I, § 7 (Bicameral and Presentment Clauses).

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." U.S. CONST. ART. I, § 9 (Appropriations Clause).

STATEMENT OF THE CASE

The Petitioners, each personally, concretely and economically injured by the DRA, sued to declare it

unconstitutional and unenforceable as a Law, seeking judicial enforcement of Article I, § 7. Prior to 2006, modern constitutional jurisprudence held that the power to create federal legislation could only "be exercised in accord with a single, finely wrought and exhaustively considered, procedure" that requires identical text to be adopted in three stages: by a majority of the Senate, by a majority of the House of Representatives and by the President's signing the identical text. *Clinton v. City of New York*, 524 U.S. at 439-40, 448 (quoting *INS. v. Chadha*, 462 U.S. 919, 951 (1983)). The presence of non-identical language "at any one of those three stages" meant that a Law "would not have been validly enacted." *Id.* at 448.

The DRA purportedly became a Law through operation of the "enrolled bill rule," used for partisan expediency after the House and Senate passed non-identical texts by a one vote margin in each chamber. If put to a further vote, no one knew in what text the DRA would emerge, if at all. The DRA did not result from a Bill that passed the House of Representatives and the Senate in identical form and that was presented in that identical form to the President.

Among other things, the DRA not only appropriated money from the Treasury but on July 1, 2006, ended the ability of education loan borrowers to refinance their Federal Family Education Loan ("FFEL") program consolidation loans to make the costs of a college education more affordable. The DRA did this by shutting down the multibillion dollar segment of the education loan industry that provided the only means whereby borrowers having only FFEL consolidation loans could

refinance them with better rates and/or borrower benefits.[4] The DRA also sharply increased education loan interest rates and imposed new charges on lenders that made interest rate reductions to borrowers impractical.

Petitioners — two education loan borrowers who have only FFEL consolidation loans and an education financing company that provides education loan financial services and makes FFEL loans under a statutorily authorized eligible lender trusteeship agreement — sued as plaintiffs to declare the DRA unconstitutional as violating U.S. CONST. ART. I, §§ 7 (Bicameral and Presentment Clauses) and 9 (Appropriations Clause). Petitioner Carina D. Ball, a working mother of three who teaches reading as a substitute teacher, carries a huge education loan burden incurred to earn her Bachelor's and Master's degrees in education which the DRA ended her right to refinance. Petitioner Nathan Bazyk, an electrical engineer, carries significant loans from financing part of his undergraduate education, which the DRA ended his right to refinance. Petitioner OneSimpleLoan, a student loan company that enables borrowers to refinance their education loans and a non-bank FFEL lender that makes FFEL loans, lost the ability to conduct significant lending business.

The defendants direct the U.S. Department of Education ("Department"), which administers the FFEL loan program and implemented DRA-made

[4] The Higher Education Act ("HEA") (excluding DRA-made amendments) provided such borrowers with one refinancing mechanism, two-step reconsolidation, that the DRA terminated. *See* 20 U.S.C. §§ 1001, *et seq.*

changes to the HEA that ended the refinancing of FFEL consolidation loans, markedly increased interest rates and imposed significant additional charges on FFEL consolidation loan lenders. As a result of the defendants' implementation of the unconstitutional DRA, the petitioners suffered personal, immediate, and concrete injury. The DRA deprived the two FFEL consolidation loan borrower petitioners of their pre-DRA right to refinance their student loans at competitive rates and/or with better borrower benefits. The DRA deprived petitioner OneSimpleLoan of the ability to provide refinancing for FFEL consolidation loans, imposed new charges on FFEL consolidation loan lenders, raised FFEL consolidation loan borrowers' interest rates and eliminated a significant portion of OneSimpleLoan's business.

After the President signed the DRA, and before its provisions that purportedly amended the HEA took effect, petitioners sued in the district court to enjoin the DRA's changes to the HEA from taking effect, to declare the DRA unconstitutional and to grant such other relief as was appropriate. The district court had original jurisdiction pursuant to 28 U.S.C. § 1331, 20 U.S.C. § 1082(a)(2), and 5 U.S.C. § 702.

The petitioners promptly sought preliminary injunctive relief and also moved for summary judgment, setting forth undisputed facts which the defendants did not contest. The undisputed facts included that:

- the text of the Bill that passed the Senate (by a one-vote margin) was not identical to

the text that passed the House of Representatives (by a one-vote margin);[5]

- the differences between the two texts were substantial (amounting to billions of dollars of spending);[6]

- officials of the House and Senate, who were of the same political party, knew that the two Bills differed materially;[7]

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[5] The Senate passed one text of S. 1932, 109th Cong. (2005) on December 21, 2005, by a tie vote broken by the Vice President. The House of Representatives passed a different text on February 1, 2006, by a vote of 216 to 214.

[6] The DRA, in addition to amending the HEA, also addressed certain Medicare benefits, the limits of which differed materially in the House and Senate Bill texts. While the Senate Bill, S. 1932, 109th Cong. (2005), set the limit at 13 months, the Bill passed by the House of Representatives provided for a 36 month period (in five different subsections), resulting in a $2 billion dollar difference to elderly and other Medicare recipients. Comparison of the Bill text as passed by the House with P.L. 109-171 proves this. The House-passed Bill is admissible. FED. R. EVID. 803(6)&(8). The CONGRESSIONAL RECORD also recites verbatim that the text of the Bill that the House passed, is to be judicially noticed, FED. R. EVID. 201, and is admissible. FED. R. EVID. 803(6)&(8); *see* CONG. REC. H68-114 (Feb. 1, 2006). It matches the House-passed Bill, *see id.* H77, col 2. The Clerk of the House issued a report confirming these facts. All are in the record. The Government Printing Office made the non-matching texts available to the world on the Internet. The national and international media reported the facts to the world at large. Only the federal judiciary feigns ignorance.

[7] Additionally, between December 22, 2005, and February 1, 2006, Senate and House officials even discussed the (Cont'd)

- those two officials knowingly signed the Senate's text as if the identical text had passed the Houses while knowing that had not occurred;

- the President, who is of the same party as the officials of the House and Senate who signed the Senate version's text, was presented with and signed the Senate Bill knowing that its text did not match the text passed by the House;

- the non-matching Senate Bill was signed deliberately for expediency;

- the Senate version was signed with the intention that the Executive Branch would create a "law" by invoking the "enrolled bill" rule of *Field*;

- the Senate passed a Concurring Resolution, S. Con. Res. 80, 109th Cong. (2006), in an effort to cure the constitutional violation; and

- the House of Representatives did not pass the Concurring Resolution

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(Cont'd)
parliamentary options for changing the text on which the House would vote so that it would match the text passed by the Senate. None of the options were exercised. On February 1, 2006, the House voted on and passed a different text than the Senate had passed.

Respondents neither disputed nor offered evidence to controvert the facts as set forth by the petitioners. Respondents cross-moved to dismiss the complaint.

The district court granted the cross-motion and denied petitioners' summary judgment motion holding that, as a matter of law, "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Pet. App. 45a.

Petitioners appealed to the U.S. Court of Appeals for the Second Circuit. It affirmed the judgment of the district court and concluded that, absent this Court's direction to do so, the *stare decisis* doctrine precludes the lower courts from assessing the need for the enrolled bill in modern times or creating exceptions to the enrolled bill rule on the basis of technological or political developments since *Field*, such that *Field's* enrolled bill rule precludes the Judiciary from reviewing violations of the Bicameral, Presentment and Appropriations Clauses under any circumstances whatsoever. Pet. App. 2a. The Court of Appeals curiously held that *Field* has not even been narrowed even though this Court's decision in *Munoz-Flores* holds that the "enrolled bill rule" is a rule of evidence that has no application to a case, such as this one, which implicates a Constitutional provision. *Id.* The Court of Appeals further held that the Judiciary cannot inquire into the facts of violations of the Bicameral, Presentment and Appropriations Clauses under any circumstances, even in the face of allegations and undisputed proof that governmental officials knowingly and intentionally conspired to violate the Bicameral, Presentment and Appropriations Clauses and schemed to use the "enrolled bill rule" as a ruse to

treat as a Law something which they knew had not been enacted as required by the U.S. Constitution. *Id.*

The Court of Appeals explained: "In the last analysis, even if plaintiffs' arguments support the creation of exceptions to the enrolled bill rule in some circumstances (or militate toward abandoning the rule altogether), we are not at liberty to depart from binding Supreme Court precedent 'unless and until [the [Supreme] Court reinterpret[s]' that precedent." Pet. App. 25a-26a. The Court of Appeals repeatedly reiterated that the issues are for the Supreme Court. For example, the Court of Appeals stated:

> ". . . we note that it is for the Supreme Court rather than a court of inferior jurisdiction to determine whether the venerable enrolled bill rule requires revision in light of technological and political developments since *Marshall Field* was decided in 1892." Pet. App. 14a.
>
> ". . . we do agree with plaintiffs that the Supreme Court has been less than clear in explaining why courts may probe congressional documents when adjudicating some types of constitutional claims but not others. . . . In any event, our task is to apply clearly established Supreme Court precedent, not to speculate on the reasons the Supreme Court might have had for creating this precedent." Pet. App. 22a-23a n.7.
>
> "Whether the enrolled bill rule has come to serve as an incentive for politicians to avoid

> the rigors of constitutional law-making is a different question. The answer might provide a policy argument against strict application of the enrolled bill rule, but we are bound to follow Supreme Court precedent as it currently exists." Pet. App. 25a.

> ". . . we conclude that the holding of *Marshall Field* is directly on point and that the Supreme Court has not overruled or narrowed that holding. Moreover, absent Supreme Court direction, we may not reassess the need for an enrolled bill rule or create exceptions to that rule on the basis of technological and political developments since *Marshall Field* was decided." Pet. App. 2a.

The district court initially gave two reasons for dismissing petitioners' claim that the DRA is unconstitutional. First, the district court determined that petitioners lacked standing to obtain redress because, "[i]f the DRA were held unconstitutional, Congress might not choose to change the restrictions allegedly placed on the two-step loan reconsolidation process or lower interest rates on FFEL loans." Pet. App. 55a. Second, the district court held that the "enrolled bill rule" of *Field v. Clark*, precluded judicial inquiry into the violation of Article I, Sections 7 and 9. Pet. App. 55a. In a later order, the district court also held that, at most, only persons injured by the words in "the one provision" that "allegedly was not approved by both Houses of Congress" could have standing to sue, because "the remedy" would be to "sever" that provision; but, even they could not sue because "[i]t may be equally probable

that Congress would resolve the Medicare equipment discrepancy . . . and pass an otherwise identical bill." *Id.* at 55a-56a. The later order added that the education lender plaintiff further lacked standing because its harm derived from injury to borrowers. The district court entered a final judgment dismissing the complaint. The Court of Appeals did not reach the district court's rationale about the petitioners' standing.

REASONS FOR GRANTING THE PETITION

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The Court of Appeals' decision that the "enrolled bill rule" bars judicial enforcement of Article I, §§ 7 (Bicameral and Presentment Clauses) and 9 (Appropriations Clause) conflicts with this Court's decisions in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), *Clinton v. City of New York*, 524 U.S. 417 (1998), and *INS v. Chadha*, 462 U.S. 919 (1983), among others.

In *Munoz-Flores*, this Court held that *Field's* enrolled bill rule is a rule of evidence that has no application to a case which implicates a constitutional provision. *Munoz-Flores*, 495 U.S. at 391 n.4.[8] The

[8] *Munoz-Flores* confines *Field* to the "evidentiary" question only of whether a chamber's "Journal" is conclusive as to the text of a bill. *Munoz-Flores*, 495 U.S. at 391 n.4.

present case implicates multiple constitutional provisions and *Munoz-Flores* mandates that "*Field* does not apply." *Id.* Despite the constitutional nature of petitioners' claims and this Court's explicit holding in *Munoz-Flores*, the Court of Appeals erroneously concluded "that the holding of *Marshall Field* is directly on point and that the Supreme Court has not overruled or narrowed that holding." Pet. App. 2a.

Munoz-Flores involved a constitutional challenge, arising under the first sentence of Article I, §7 of the U.S. Constitution (the Origination Clause) to an "enrolled bill." *Munoz-Flores*, 495 U.S. at 387. The Origination Clause mandates that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. CONST., ART. I, §7, CL. 1. The "enrolled bill" in *Munoz-Flores* stated on its face that it originated in the House of Representatives. *Munoz-Flores*, 495 U.S. at 410 (concurring opinion). The challenged law, however, had *in actual fact* originated in the Senate. *Id.* at 388.

The government argued that *Field's* enrolled bill rule precluded this Court from looking past the face of the "enrolled bill" to see whether the law had been enacted in conformity with Article I, Section 7. Consistent with the established precept that constitutional questions will not be resolved unless it is necessary to reach them, this Court had first to decide whether it had a duty to look past the face of the "enrolled bill."

This Court rejected the government's position, holding instead that the judiciary "has the ***duty*** to review

the constitutionality of congressional enactments." *Id.* at 391 (emphasis added). Addressing the "enrolled bill" rule of *Field*, this Court held that, in performing that duty, "[w]here, as here, a Constitutional provision is implicated, *Field* does not apply." *Id.* at 391 n.4.

In *Munoz-Flores*, this Court also took up the various arguments advanced here below by the government to justify the "enrolled bill" rule as precluding judicial review. The *Munoz-Flores* opinion systematically analyzed and rejected the arguments that compliance with Article I, Section 7 either raised a nonjusticiable political question or showed "a lack of respect" for the other Branches of the federal government. *Id.* at 389-91. Ultimately, the *Munoz-Flores* Court concluded:

> On the contrary, this Court has the duty to review the constitutionality of congressional enactments. As we have said in rejecting a claim identical to the one the Government makes here: "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the court's avoiding their constitutional responsibility." Powell v. McCormack, 395 U.S. 486, 549 (1969).

United States v. Munoz-Flores, 495 U.S. 385, 391 (1990).

The government also argued in *Munoz-Flores* that individuals cannot enforce Article I, Section 7 because it does not establish individuals' rights, but regulates how government functions. The Court explained in *Munoz-Flores* that "the Government attempts to use its arguments to establish that judicial resolution of Origination Clause challenges would entail a substantial lack of respect for the House, a factor that [*Baker v. Carr*, 369 U.S. 186 (1962)] does identify as relevant to the political question determination. Neither of the Government's arguments persuades us." *Munoz-Flores*, 395 U.S. at 392.

The government also argued that the other Branches have the power and strong incentives to assure that their Constitutional prerogatives are respected, such that the judiciary should not decide the constitutional issue being raised. Rejecting that argument, this Court explained:

> Even if we were to assume that the House does have more powerful incentives to refuse to pass legislation that violates the Origination Clause, that assumption would not justify the Government's conclusion that the Judiciary has no role to play in Origination Clause challenges. In many cases involving claimed separation-of-powers violations, the branch whose power has allegedly been appropriated has both the incentive to protect its prerogatives and institutional mechanisms to help it do so. Nevertheless, the Court adjudicates those separation-of-powers claims, often without suggesting that they might raise political questions. In short, the fact that one

> institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question.

Id. at 393.

Field attributed the desirability of an enrolled bill rule to "[t]he respect due to coequal and independent departments . . . ." *Field v. Clark*, 143 U.S. 649, 672 (1892). However, any judicial declaration of unconstitutionality shows a "lack of respect" to another Branch, but that does not bar the judiciary from discharging its duty. Here, the decision by a few Congressional and Executive Branch personnel of the same party may have given rise to a partisan political case, but not a political question because the Constitution does not confine the determination of the question of compliance with Article I, Sections 7 and 9 to those few individuals. If it did, we would have a government of men, not a government of law.

The overriding consideration in *Field* was that "'the stability of all written law will be shaken to its very foundation'" if the validity of legislative enactments are to be tested by a comparison with imperfect and unauthenticated journals. *Field*, 143 U.S. at 674 (quoting *Pangborn v. Young*, 32 N.J.L. 29, 37 (1866)). Perhaps that was a risk with 19th Century Journals. It is not a risk in the inquiry to be made here.

Tellingly, *Munoz-Flores* concerned an Origination Clause dispute – a dispute under a constitutional provision that plausibly might be labeled an anachronism because senators are now elected directly. The issue here – which arises under the next sentence of Article I, Section 7 (Bicameral and Presentment Clauses) – concerns what this Court acknowledges to be the "single, finely wrought and exhaustively considered procedure" that is the lynchpin of our system of federal government. *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998). The Court of Appeals' invocation of the enrolled bill rule in this case is troubling because it facially places the Origination Clause on a higher footing than the Bicameral and Presentment Clauses of the Constitution, even though the latter two comprise the heart of the Constitution's system of checks and balances.

It is submitted that the Court of Appeals' decision reduces federal constitutional law precedent to ritualistic formalism and yields a senseless result which this Court did not intend in *Munoz-Flores*. That is, the Court of Appeals' invocation of the enrolled bill rule in this action effectively strips the constitutional lynchpin clauses of their force by preventing courts from accepting any evidence to show that these provisions have been violated, even in a case such as this one where uncontradicted documentary evidence (indeed, the as-passed texts themselves) establishes the constitutional violation. Surely, such was not the intent of the Court in *Munoz-Flores*. Rather, in authorizing Origination Clause challenges based on evidence outside the "enrolled bill" itself, this Court in *Munoz-Flores* held that the judiciary "has the ***duty*** to review the constitutionality of congressional enactments." *United States v. Munoz-*

Flores, 495 U.S. 385, 391 (1990) (emphasis added). In so holding, this Court did not place the Bicameral Clause or Presentment Clause on a lesser tier of constitutional protection or create an exception to the Judiciary's duty to enforce constitutional requirements. Instead, this Court stated generally that "[w]here, as here, a constitutional provision is implicated, *Field* does not apply." *Munoz-Flores*, 495 U.S. at 391 n.4.

The Court of Appeals' opinion reveals that its refusal to follow *Munoz-Flores* is nominally predicated upon the notion that the holding of *Munoz-Flores* is "oblique" and thus need not be followed. Yet, this Court's language in *Munoz-Flores* is plain: "*Where, as here, a constitutional provision is implicated, Field does not apply.*" *Id.* (emphasis added). This sentence leaves nothing to the imagination and, in light of its clarity, it is quite fantastic that lower courts refuse to apply this Court's ruling, instead asserting that "the Supreme Court has been less than clear in explaining why courts may probe congressional documents when adjudicating some types of constitutional claims, but not others." Pet. App. 22a-23a n.7. Despite *Munoz-Flores'* clear language, the Court of Appeals curiously stated that it is "difficult to discern precisely what the Court *meant* to say." Pet. App. 22a. In the Court of Appeals' quest to find the hidden "meaning" of the words used, it opined that, "[w]hatever plausible alternative interpretations may be supported by the language of the 'oblique footnote,' plaintiffs' reading is not one of them." Pet. App. 22a. The purported "support" relied on by the Court of Appeals in reaching this curious determination is that both *Field* and the present case involve the same "constitutional deficiency."

Field, however, is very different from this case. This Court in *Field* defined the issue being decided in *Field* as whether "[an enrolled act] cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the President." *Field v. Clark*, 143 U.S. 649, 672 (1892). Perhaps, as the government would like to pretend occurred, this Court could in *Field* have taken up a different constitutional question than the one it chose to address. However, this Court in *Field* held only that the Constitution's Journal Clause established no requirement that the Journals include the information claimed by the *Field* plaintiff to be absent and, therefore, the absence of such information from the Journals had no evidentiary consequence. *Munoz-Flores* acknowledged that *Field* involved a Journal Clause controversy regarding the "'nature of the evidence' the Court would consider." *Munoz-Flores*, 495 U.S. at 391 n.4.

Here, we neither rely upon omissions from Journals nor deal with a Journal Clause violation. Rather, this case involves a constitutional challenge to a law that ***undisputedly*** did not pass both Houses of Congress. *Munoz-Flores* makes clear that "*Field* does not apply" to this type of challenge. *Id.* Admittedly, *Field* contained expansive *dicta*.[9] *Munoz-Flores* disposed of those *dicta*, for those *dicta* would have ended the inquiry in *Munoz-Flores* by requiring that this Court look merely at the

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[9] *See, e.g., Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

text on the face of the "enrolled bill" which made it appear as if something originated in the House even though it originated in the Senate.

It has also been suggested that *Munoz-Flores* is oblique because the language resides in a footnote. However, the mere placement of the ruling does not limit its precedential value and the acknowledged holding of some of this Court's opinions resides in footnotes. *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938)(holding aliens to be a "discrete and insular" minority). Moreover, the footnote whose text the Court of Appeals failed to follow was central to this Court's decision in *Munoz-Flores* that the judiciary can and must entertain Article I, §7 Origination Clause challenges.[10]

The likely "real" reason for the lower courts' turning a blind eye to a blatant violation of the Constitution is that the DRA is so complex a law that, if declared unconstitutional, the result of statutory texts reverting back to what they said prior to the DRA will affect many people. Although citizens injured by the DRA will have their rights restored to pre-DRA status, citizens who profited from the DRA will see their new rights end.

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[10] If the *Munoz-Flores* Court had instead determined that the enrolled bill rule applied, such would have foreclosed its inquiry into whether the special assessment statute was a "Bill for Raising Revenue," required to originate in the House of Representatives. Rather, the Court would have been required to reverse the judgment of the appellate court– that the statute violated the Origination Clause – on the ground that the enrolled bill rule precluded the court's inquiry into the origins of the statute.

Concern over those consequences, however, is not a reason for judicial abdication of the Constitution, but rather for its judicial enforcement, because those who would continue to lose by pretending that the DRA is "a Law" should not have lost their rights in the first place and those who would continue to gain from the pretense have no constitutional predicate for continuing to receive them. This reinforces the conclusion that judges should not engage in their own *realpolitik* analysis of constitutional violations or excuse violations that are too important to be corrected. Rather, unless the Judiciary performs its duty to enforce the constitution, partisan expediency will continue to encourage recurring future dilution of constitutional mandates to suit the whims of transient majority blocks.

Also, on a technical level, the Court of Appeals' analysis is wrong, even if this Court had not decided *Munoz-Flores*. On the same day that this Court decided *Field*, it decided *United States v. Ballin*, 144 U.S. 1 (1892), a Quorum Clause case. In *Ballin*, this Court looked beyond the face of an enrolled bill to see if it was passed by the requisite quorum, because "'whenever a question arises in a court of law of the existence of a statute . . . , the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question . . . .'"[11]

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[11] *Ballin* relied upon *Gardner v. Collector*, 73 U.S. (6 Wall.) 499, 511 (1867), in which this Court held:

> We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court

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Id. at 3 (quoting *Gardner v. Collector*, 73 U.S. (6 Wall.) 499, 511 (1867)). The Constitution imposed no requirement that Congress record its quorums and the Journal Clause does not address quorum recording. In *Ballin*, this Court explained that in *Field* it "had occasion to consider the subject of an appeal to the journal in a disputed matter", *Ballin*, 144 U.S. at 3-4, but then in *Ballin* this Court proceeded systematically to review congressional Journals for evidence that the Court then used to calculate the Quorum (a subject on which the Journal did not report). This Court's actions in *Ballin* contradict *Field*'s *dicta* that same day that the enrolled bill rule precluded looking beyond the face of an enrolled bill to analyze its constitutional validity. *See Field*, 143 U.S. at 671.[12] Had the "enrolled bill rule" been applied,

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> of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.

[12] Even had this Court not decided *Munoz-Flores* or *Chadha*, *Field* has no *stare decisis* effect here because that doctrine does not extend to *dicta*. As Chief Justice Marshall admonished in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821), "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Accord Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006).

quorum computations would be unnecessary. That sharp contrast in same-day opinions speaks to this Court's intention in 1892, as to what *Field held*, as contrasted with Justice Harlan's *dicta*. Just as this Court in *Ballin* considered pertinent evidence outside the face of the enrolled bill to adjudicate compliance with the Quorum Clause, the lower courts here should have considered pertinent evidence on whether the DRA passed in compliance with the Bicameral, Presentment and Appropriations Clauses.

In *INS v. Chadha*, this Court held that, "the constitutionality of a statute . . . is a decision for the courts." 462 U.S. 919, 942 (1983). In so holding, this Court explained that a law is not "somehow immunized from constitutional scrutiny because the Act . . . was passed by Congress and approved by the President." *Id.* Going at least as far back as *Marbury v. Madison*, this Court declared that, "[i]t is emphatically the province and duty of the judicial department to say what the law is" and that a law "repugnant to the constitution, is void." 5 U.S. (1 Cranch) 137, 177 (1803).

Prior to the shenanigans that yielded the DRA, this Court's modern constitutional jurisprudence explicitly held that a Bill becomes a Law *only* after three mandatory steps are taken. Specifically, "(1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President." *Clinton v. City of New York*, 524 U.S. 417, 448 (1998). If any of the text differed "at any one of those three stages," a Law "would not have been validly enacted." *Id.* Essential to

the proper operation of a bicameral legislature, these lynchpins of checks and balances are "intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power . . . ." *Chadha*, 462 U.S. at 957. As this Court made plain in *Clinton v. City of New York*, unwavering compliance applies and statutes may be enacted only "'in accord with a single, finely wrought and exhaustively considered procedure.'" 524 U.S. at 439-40 (quoting *Chadha*, 462 U.S. at 951). "Congress cannot exercise its legislative power to enact laws without following the bicameral and presentment procedures specified in Article I." *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275 (1991).

The bicameral and presentment procedures specified in Article I were not followed in creating the DRA. Rather, a few government officials made a putative Law by invoking the "enrolled bill rule" for purposes of expediency. The "enrolled bill rule" should not and does not provide an expedient alternative to following the Constitution's mandatory mechanism for creating a federal statute.

In accord with the foregoing decisions of this Court, *Munoz-Flores* holds that the judiciary has the "***duty*** to review the constitutionality of congressional enactments" and that the enrolled bill rule cannot obstruct the performance of that judicial duty. *United States v. Munoz-Flores*, 495 U.S. 385, 391 (1990) (emphasis added). In so ruling, *Munoz-Flores* reaffirms that the judiciary is the final arbiter of obedience to constitutional requirements and that courts must use

their full array of judicial tools to assure that the other Branches obey the Constitution.

In sum, this Court's decision in *Munoz-Flores* is clear, well reasoned and consistent with this Court's prior precedent concerning the function of the judiciary and the nature of the government's system of checks and balances. *Munoz-Flores* limits the application of the "enrolled bill rule" to cases where Constitutional requirements binding Congress are absent, and thus permits courts to perform their mandatory, essential judicial review function. Were the enrolled bill rule not so limited, it would effectively thwart the ability of the judiciary to ensure Congressional and Executive compliance with the Constitution's dictates in enacting laws and, as such, would ultimately render constitutional provisions, such as these lynchpin clauses, meaningless. By reaching a contrary conclusion, the Court of Appeals decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

II.

USING THE "ENROLLED BILL RULE" TO CREATE A STATUTE AND IMMUNIZE AN UNDISPUTED CONSTITUTIONAL VIOLATION FROM JUDICIAL REVIEW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT

If the Court of Appeals was bound to apply the "enrolled bill rule" of *Field* as a binding precedent here, then the petitioners respectfully submit that it is time for this Court to reassess the "enrolled bill rule." This is

a judge-made rule, not the product of the Constitution's commitment of compliance with Article I, §§ 7 and 9 to an organ of government other than the Judiciary. The "rule" comprises a unique exception to the established precept that "[i]t is emphatically the province and duty of the judicial department to say what the law is" and that a law "repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

We deal here with a situation in which no genuine dispute exists that the DRA did not result from the passage by the Senate and House of Representatives of identical texts which the President then signed. This inescapable truth is both undisputed as a fact and confirmed by competent evidence available without intrusion into the other branches of government. We also deal here with a troubling situation in which no genuine dispute exists that a few officials of the same party in the Senate, House of Representatives and Executive Branch deliberately chose to use the "enrolled bill" rule to create a putative Law out of non-matching texts passed by the Senate and House. This case goes to the heart of this Court's role to assure that the other branches of government obey the Constitution.

Moreover, one cannot seriously entertain the proposition on which the "enrolled bill rule" rests, that "*the stability of all written law will be shaken to its foundation*," *Field v. Clark*, 143 U.S. 649, 674 (1892) (emphasis added) (quoting *Pangborn v. Young*, 32 N.J.L. 29, 37 (1866)), were the Judiciary to recognize a material inconsistency, apparent from the texts of both the House and Senate Bills themselves. In the 21st Century, however, it transcends the implausible to assert that the

stability of our legal system will be shaken, much less to the point of collapse, were this Court to conclude that the text of the Bills as passed were not identical ***as required*** by the Constitution. The far greater risk is that the now-well-known fact that the Executive Branch implemented a putative Law not enacted in conformity with lynchpin clause of the Constitution, if left judicially unredressed, has yielded and will continue to yield unacceptable constitutional mischief by one or both of the other Branches.

While *Field* sought to protect the laws of society from judicial meddling by recognizing the "respect due to coequal and independent departments," even the *Field* opinion does not decree that a Court must deliberately close its eyes to the truth, refusing to strike down a blatantly unconstitutional law. *See Field*, 143 U.S. at 672 (leaving it to "the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution"). Extending application of the enrolled bill rule to this lawsuit, which requires minimal judicial inquiry into legislative actions, would pervert the rule of law into the rule of individual men. Indeed, modern constitutional law jurisprudence holds that "Congress may not delegate the power to legislate to its own agents or to its own Members." *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275 (1991).[13] Allowing constitutionally impermissible

[13] This Court has also held that "'[t]he two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate

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legislative action to occur, by turning a blind judicial eye to it in the guise of applying a judge-made rule of evidence, vests legislative power in a handful of agents and yields an identically unacceptable result.

Field attributed the enrolled bill rule to "[t]he respect due to coequal and independent departments . . . ." 143 U.S. at 672. Applying *Field* to the facts here represents the misapplication of 19th Century notions of nonjusticiability, long discarded by the analytical framework fashioned by this Court in *Baker v. Carr*, 369 U.S. 186 (1962).

In *Baker*, this Court established a new analysis to be applied to assess whether "the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of government," would immunize unlawful governmental action from judicial review, viz., the "political question doctrine." *Id.* at 217. Any judicial declaration of unconstitutionality shows a "lack of respect" to another Branch, but that does not bar the judiciary from discharging its duty. This Court explained in *Baker* that "[t]he doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Id.* Here, the decision by a few Congressional and Executive Branch personnel of the

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member or number of members, but the action of the body as a whole.'" *Raines v. Byrd*, 521 U.S. 811, 829 n.10 (1997) (quoting *United States v. Ballin*, 144 U.S. 1, 7 (1892)).

same party may have given rise to an arguably political case, but the Constitution does not confine the deciding of the question of compliance with Article I, Sections 7 and 9 to those few individuals. If it did, we would have a government of men, not a government of law. The Constitution also provides clear and manageable guidance for assuring compliance with the finely wrought procedure for enacting a Law.

If this Court's decision in *Munoz-Flores* did not narrow or overrule the application of the "enrolled bill" rule of *Field* so as to render it inapplicable in Bicameral, Presentment and Appropriations Clauses cases such as this, then the Court of Appeals is correct that "the Supreme Court has been less than clear in explaining why courts may probe congressional documents when adjudicating some types of constitutional claims, but not others." Pet. App. 22a. We respectfully submit that the time has come to reassess the "enrolled bill rule" and provide the clarity needed for lower courts to determine whether and why they may take cognizance of the truth when adjudicating some types of constitutional claims, but not others.

Moreover, now, in the Twenty-First Century, we know, from the texts of the bills themselves, what the House and the Senate passed. The *Field* opinion took note of the "evils that may result" as a consequence of the application of the enrolled bill rule. 143 U.S. at 673. On the basis of its assessment of 19th Century technology, *Field*'s author used *dicta* to express a policy decision based on 19th Century technology. However, the same or worse evils that he sought to avoid exist in turning a blind eye to unconstitutional conduct. We are not in the

Nineteenth Century perusing quill-scrivened Journal entries, under fading oil lamps to determine after the fact what transpired in smoke clouded rooms. The change in information technology since the 19th Century has created a modern situation in which holding the other Branches to their constitutional duty will not shake the stability of all law to its foundation, and applying an enrolled bill rule to a case such as this makes no sense. The time has come to shed light on the truth and "reassess the need for an enrolled bill rule or create exceptions to that rule on the basis of technological and political developments since *Marshall Field* was decided." Pet. App. 2a.

Even more troubling, we face here a situation in which politicians schemed to make "law" by using a judge-made rule of evidence to side-step the express requirements of the U.S. Constitution that establish the most fundamental precepts of how law must be made. When "the enrolled bill rule has come to serve as an incentive for politicians to avoid the rigors of constitutional law-making is a different question." Pet. App. 25a. That surely calls upon this Court to make a policy decision about "strict application of the enrolled bill rule." *Id.* The Constitution's text does not enshrine an "enrolled bill rule." It is a judicial creation from a different era and has only that force which the judiciary invests in it. If there is to remain such a judicial graft on Article I, Section 7, then the Judiciary should refrain from applying the enrolled bill rule at least here, where a constitutional violation exists on the faces of the Bill texts as passed.

The desirability of an "enrolled bill rule" has hardly been embraced consistently or universally, nor has the notion that the rule must operate conclusively so as to blind the courts to the clear truth. As aptly stated in *Rode v. Phelps*, 80 Mich. 598, 609, 45 N.W. 493, 496 (1890),

> [i]f the rule prevailed here . . . that the courts have no power to go behind the authentication of a law by the presiding officers of the legislature, and the approval of the Governor, to ascertain whether or not it was legally passed, under the requirements of the Constitution, we should always be in danger of having laws upon our statute-books, which, although the courts would be obliged to hold them valid under such a rule, were never passed by the legislature, and were really created by the carelessness or corruption of some member, clerk, or employee of that body, or perhaps by the interpolation of a member of what is sometimes facetiously called the 'Third House,' but which is nothing more nor less than an organized, and generally unscrupulous, lobby.

Certainly not every jurisdiction whose courts have fashioned an "enrolled bill rule" applies the rule unthinkingly, mechanically and conclusively. For example, there is no reason why the "enrolled bill rule" could not just create a presumption that can be overcome. *See, e.g., Franklin Nat'l Bank of Long Island v. Clark*, 26 Misc. 2d 724, 742, 212 N.Y.S.2d 942, 964 (Sup. Ct. 1961), *approved by Board of Educ. v. New York*, 41 N.Y.2d 535, 538, 394 N.Y.S.2d 148, 152, 362 N.E.2d 948, 951 (1977);

Yarger v. Board of Regents, 98 Ill. 2d 259, 456 N.E.2d 39 (1983). Here, any presumption made in favor of the DRA is clearly overcome. Surely, at a minimum, no rational basis exists for denying to the judiciary access at least to "any written evidence [that] was preserved as a memorial of the official acts and transactions of the [legislative or executive] office." *See, e.g., Amos v. Gunn*, 84 Fla. 285, 351, 94 So. 615 (1922) (on rehearing). That approach would also invalidate the DRA as unconstitutional. Of course, that approach would not preclude considering other evidence in egregious factual circumstances. *See, e.g., State v. Kaufman*, 430 So. 2d 904, 906 (Fla. 1983). Such circumstances also exist here. *See also* Note, *Constitutional Law*, 77 HARV. L. REV. 1526 (1964) (approximately half the states "allow the enrolled bill to be impeached").

The undisputed facts about the creation of the DRA putatively as "a Law," and the undisputed manipulation of a judge-made rule of evidence to circumvent the Constitution, yield important questions of federal law that should be settled by this Court. Can a few individuals flout the Constitution and make a law by their mere signatures and use the "enrolled bill rule" to blind the Judiciary to the truth of what the rest of the world plainly sees? Or must federal statutes result only from the Constitution's single, finely wrought and exhaustively considered procedure?

III.

THE LOWER COURTS' DECISIONS RAISE IMPORTANT QUESTIONS REGARDING STANDING TO MAKE CONSTITUTIONAL CHALLENGES TO LEGISLATION THAT CONFLICT WITH PRIOR DECISIONS OF THIS COURT

Although the Court of Appeals found it unnecessary to address the district court's opinion on standing, the district court followed the precept that Article III jurisdiction (hence, standing) is always an antecedent question. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998). The district court then made rulings on standing so extraordinary that they revolutionize federal constitutional law.

Although the DRA deprived the borrower petitioners, Ms. Ball and Mr. Bazyk, of their right under the HEA to refinance their FFEL consolidation loans to obtain better rates and lower benefits, the district court held that they lacked standing because "'If the DRA were held unconstitutional, Congress might not choose to change the restrictions allegedly placed on the two-step loan reconsolidation process . . . It may be equally probable that Congress would resolve the Medicare equipment discrepancy . . . and pass an otherwise identical bill.'" Pet. App. 32a.

Therefore, the district court ruled, the judiciary cannot provide redress to the petitioners because they cannot foreclose the possibility that Congress would later pass similar legislation adverse to them. However, this

new standing requirement would preclude any future challenges to any Congressional action because it is always possible to say that Congress, upon learning that a court has struck down a particular bill or statute, could try and accomplish the same result through some other means, *e.g.*, a new and different bill or statute. Indeed, Congress does this often, as with legislation about abortion, the exercise of speech, voting rights, etc. Any constitutional challenge to Congressional action would always be precluded because, under the District Court's conception of redressability, no plaintiff could ever establish that its injury would be redressed by a favorable outcome. Accordingly, this Court needs to address the district court's novel and subversive redressability requirement because it raises important legal questions that have nationwide implications.

The district court also held that the petitioners lacked standing because a court can "sever" from the DRA the words that did not match in the two different texts that the House of Representatives and Senate passed, leaving the remaining words as a constitutionally valid Law as if Congress had passed identical texts. Pet. App. 31a-32a. Were that the case, then this Court's decision in *Clinton v. City of New York* must be overruled because it expressly holds that when the texts of the two Houses do not match, a Law "would not have been validly enacted." 524 U.S. 417, 448 (1998). The judiciary would be the Branch that now enacts a Law from nonidentical texts.

The Judiciary cannot "sever" the DRA and thereby enact a Law. A provision of a law (*n.b.*, none exists here) is only presumed severable "if what remains after

severance 'is fully operative as a law.'" *INS v. Chadha*, 462 U.S. 919, 934 (1983) (quoting *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)). Here, no law came into existence within the meaning of the Constitution. Therefore, nothing can be "severed" from the DRA that will create "a Law" because only Congress passes laws and no "Law" has been constitutionally passed.

Moreover, the basic unit mandated by Article I, Section 7 is an entire "Bill." Legislators vote on and Presidents approve or veto the "Bill," not its line items or internal phrases. The notion of using Judicial "severability" to create Law from conflicting Bills ignores the "horse trading" that takes place to garner the votes needed to pass a law, ignores that legislation is not passed by line item and defies common sense. It would set a dangerous precedent, allowing the Judiciary to legislate and those in powerful positions to circumvent the bicameral process.

In *Clinton v. City of New York*, this Court rejected as unconstitutional the notion that the President could use a line item veto to in essence enact a law that had never been voted on by both Houses of Congress. 524 U.S. at 417. The result would be the same if the Judiciary were to sever out the non-identical portion of the DRA. Severing out some portion of the DRA's text cannot remedy the Constitutional defect because two identical Bills never passed. This Court should review these extraordinary propositions that judicial severance from the DRA of the various Medicare durable equipment provisions comprises the sole remedy for its

unconstitutionality and that such a severance would make the DRA constitutionally a Law.

Finally, although the district court conceded that the borrowers had sufficient economic injury for standing (but for the court's extraordinary rulings on redress and severance), Pet. App. 31a, the district court held that plaintiff OneSimpleLoan lacked standing because its injury flowed from injury to education loan borrowers who were its customers and potential customers. Pet. App. 32a-33a. That decision conflicts with this Court's decisions on standing. The desire to protect one's "economic well being" provides adequate standing to sue, *see Jenkins v. McKeithen*, 395 U.S. 411, 423-24 (1969), and "he who is likely to be financially injured" has standing. *Assoc. of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (quoting *FCC v. Sanders Bros. Radio Stations*, 309 U.S. 470, 477 (1940)). "Adverse personal interest, even of such an indirect sort as arises from competition, is ordinarily sufficient to meet constitutional standards of justiciability." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 151 (1951). Protection of non-economic values will also usually suffice. *Assoc. of Data Processing Service Orgs.*, 397 U.S. at 154; *FEC. v. Atkins*, 524 U.S. 11, 19-21 (1998).

Here, OneSimpleLoan suffered concrete, personal and direct economic injury as a result of the DRA because it has lost a significant line of business. It lost the opportunity to assist clients in reconsolidating their FFEL consolidation loans. It also lost the business opportunity to fund FFEL reconsolidation loans. These are clearly economic injuries. If the district court's

approach to standing is the law, then businesses will rarely have "standing" because it can usually be said that the economic injury to business usually flows from that which impacts their customers' decisions to buy. The district court's marked alteration of established "standing" law should be reviewed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JULY 19, 2007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: June 26, 2007 Decided: July 19, 2007)

Docket Nos. 06-2770-cv(L), 06-2994-cv(CON), 06-3770-cv(CON)

ONESIMPLELOAN, CARINA D. BALL, NATHAN BAZYK,

Plaintiffs-Appellants,

v.

U.S. SECRETARY OF EDUCATION, SECRETARY'S REGIONAL REPRESENTATIVE FOR REGION II,

Defendants-Appellees.

Before: WINTER, CABRANES, and RAGGI, *Circuit Judges.*

JOSÉ A. CABRANES, *Circuit Judge*:

The question presented is whether the "enrolled bill rule" articulated by the Supreme Court in *Marshall Field & Co. v. Clark,* 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892), requires the dismissal of plaintiffs' claims that the Deficit Reduction Act of 2005 ("DRA"), Pub.L. No. 109-171, 120 Stat. 4 (2006),

was enacted in violation of the Bicameralism and Presentment Clause, U.S. Const. art. I, § 7, cl. 2, and the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, of the United States Constitution. Agreeing with the recent decision of the United States Court of Appeals for the District of Columbia in *Public Citizen v. United States District Court for the District of Columbia,* 486 F.3d 1342 (D.C.Cir.2007), we conclude that the holding of *Marshall Field* is directly on point and that the Supreme Court has not overruled or narrowed that holding. Moreover, absent Supreme Court direction, we may not reassess the need for an enrolled bill rule or create exceptions to that rule on the basis of technological and political developments since *Marshall Field* was decided. Thus, faced with allegations that a law is unconstitutional because both houses of Congress did not pass identical bills, a court may not look beyond the version of the bill authenticated by the signatures of the presiding officers of the House of Representatives and Senate. We also conclude that a court may dismiss a claim on the basis of the enrolled bill rule before assessing a plaintiff's standing. The judgment of the United States District Court for the Southern District of New York (Richard M. Berman, *Judge*), which dismissed plaintiffs' constitutional claims, is therefore affirmed.

BACKGROUND

Plaintiff OneSimpleLoan is a company that markets and finances student loans. Plaintiffs Carina D. Ball and Nathan Bazyk are individual borrowers who consolidated their student loans under the Federal Family Education Loan ("FFEL") Program.

Appendix A

Plaintiffs allege that they have suffered injury on account of provisions in the DRA that (1) prohibit a method of refinancing FFEL consolidated loans and (2) impose conditions that inhibit companies from providing lower interest rates and better benefits on FFEL consolidated loans. They brought an action against defendants, the United States Secretary of Education and the Secretary's Regional Representative for Region II (which includes New York), seeking injunctive and declaratory relief. Plaintiffs alleged, *inter alia*, that the DRA was unconstitutional because the bill passed by the House of Representatives was not identical to the bill passed earlier by the Senate and presented later to the President. As evidence of this failure to pass identical texts, plaintiffs pointed to a difference between (1) the "engrossed bill" transmitted from the Senate to the House of Representatives after the Senate vote, and (2) the "enrolled bill" presented to the President after having been signed by the Speaker of the House of Representatives and the President Pro Tempore of the Senate.

A. The Bicameralism and Presentment Clause, the Appropriations Clause, Engrossed Bills, and Enrolled Bills

The Bicameralism and Presentment Clause mandates that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States. . . ." U.S. Const. art. I, § 7, cl. 2. A law has been enacted in conformance with this constitutional mandate only if "(1) a bill containing its exact text was approved by a majority of the

Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President." *Clinton v. City of New York*, 524 U.S. 417, 448, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998). Plaintiffs claim that the DRA never became a law because the House of Representatives and the Senate did not pass "precisely the same text." Plaintiffs further claim that, because the DRA is not actually a law, it also violates the Appropriations Clause, which states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7.

"Congress has established specific procedures governing passage of a bill." *Public Citizen*, 486 F.3d at 1344. Those procedures are currently codified at 1 U.S.C. § 106, which provides in relevant part:

> Every bill . . . in each House of Congress shall, when such bill . . . passes either House, be printed, and such printed copy shall be called the *engrossed bill*. . . . Said engrossed bill . . . shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and in that form shall be dealt with by that House and its officers, and, if passed, returned signed by said Clerk or Secretary. When such bill . . . shall have passed both Houses, it shall be printed and shall then be called the *enrolled bill*, . . . and shall be signed by the presiding officers of both Houses and sent to the President of the United States.

1 U.S.C. § 106 (emphasis added). *See generally* Charles Tiefer, *Congressional Practice and Procedure* 247-50 (1989) (discussing the processes of "engrossment" and "enrollment"). "An 'engrossed bill' is thus one that has passed one chamber of Congress, while an 'enrolled bill' has passed both the House and the Senate." *Public Citizen*, 486 F.3d at 1344. In the instant case, plaintiffs allege that a discrepancy between the version of the bill passed by the House and the version of the bill passed by the Senate was introduced by a transcription error made during preparation of the engrossed bill and corrected during preparation of the enrolled bill.

B. Enactment of the DRA

The DRA, signed by the President on February 8, 2006, is an omnibus budget act whose broad-ranging provisions affect not just educational lending, but also, *inter alia*, Medicare and Medicaid laws, Hurricane Katrina relief, the transition to digital television broadcasting, and the filing fees for civil actions in federal district courts. *See id.*

The following facts regarding the DRA's enactment are drawn from plaintiffs' complaint.[1] Most of the facts contained in the complaint are

1. For the moment, we defer discussion of whether it is necessary to accept as true the facts presented in a plaintiff's pleadings when a defendant moves for dismissal on the basis of the enrolled bill rule. *See* pages __ - __ *post* (discussing the enrolled bill rule's status as a non-merits threshold ground for dismissal).

summarized by the District of Columbia Circuit in *Public Citizen*:[2]

> [I]n the Fall of 2005, the House and Senate passed different versions of a budget bill referred to as S.1932. To iron out the differences, the legislation was sent to a conference committee. The committee produced a conference report which failed to pass the Senate. Shortly thereafter the Senate passed an amended version of S.1932 wherein § 5101 specified a 13-month duration of Medicare payments for certain durable medical equipment.[3] However, when the Senate clerk transmitted the

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2. In *Public Citizen*, the District of Columbia Circuit dealt with the same constitutional challenge to the DRA that we do in the instant case. *Public Citizen*, 486 F.3d at 1343 ("Public Citizen, a not-for-profit consumer advocacy organization, filed suit in District Court claiming that the [DRA] is invalid because the bill that was presented to the President did not first pass both chambers of Congress in the exact same form."). The plaintiff in *Public Citizen* has submitted an *amicus* brief to our Court in support of plaintiffs here.

Several district courts in other Circuits have rejected similar constitutional challenges to the DRA. *See Zeigler v. Gonzales*, No. 06-0080-CG-M, 2007 WL 1875945 (S.D.Ala. June 28, 2007); *Conyers v. Bush*, No. 06-11972, 2006 WL 3834224 (E.D.Mich. Nov. 6, 2006); *State of Cal., Dep't of Soc. Servs. v. Leavitt*, 444 F.Supp.2d 1088 (E.D.Cal.2006).

3. The Vice President of the United States, as President of the Senate, U.S. Const. art. 1, § 3, cl. 4, cast a tie-breaking vote in favor of the bill.

> engrossed S.1932 to the House, he mistakenly changed § 5101 of the bill to reflect a 36-month duration of payments for durable medical equipment rather than the 13-month duration actually approved by the Senate. The House voted on this engrossed bill, including the erroneous duration figure.[4] Because the legislation originated in the Senate, the House returned it to the Senate for enrollment. The Senate clerk, recognizing the transcription error in the engrossed bill, altered the text of the enrolled bill so that it included a 13-month rather than a 36-month duration. The version of the DRA signed by the presiding officers contains the 13-month figure. Thus, since the 13-month duration term in the enrolled bill passed the Senate but not the House, the President signed legislation that did not actually pass both houses of Congress in precisely the same form.

Id. at 1345. Additionally, plaintiffs in the instant case allege that (1) there existed a "legally improper arrangement among certain representatives of the House, Senate and Executive Branch to have the President sign" legislation that had not been enacted pursuant to the Constitution; (2) the Speaker of the House of Representatives and the President Pro Tempore of the Senate were aware of the discrepancy between the engrossed bill and the enrolled bill when they signed the enrolled bill; and (3) after the

4. The bill passed by a vote of 216 to 214.

President signed the DRA, the Senate passed a concurrent resolution hoping to rectify the constitutional deficiency, but the House of Representatives never passed this resolution.

C. Proceedings in the District Court

Plaintiffs commenced this action in April 2006. In May 2006, they moved for summary judgment and, in the alternative, for a preliminary injunction that would prevent implementation of the allegedly injurious student loan provisions of the DRA. Defendants cross-moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1) and Fed.R.Civ.P. 12(b)(6). In a decision and order dated June 9, 2006, the District Court determined that plaintiffs' constitutional claims were subject to dismissal under the enrolled bill rule announced in *Marshall Field.* The District Court rejected plaintiffs' arguments that (1) the enrolled bill rule was dicta and (2) in any event, the Supreme Court had overruled the enrolled bill rule in *United States v. Munoz-Flores,* 495 U.S. 385, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990). In addition to dismissing the constitutional claims on the basis of the enrolled bill rule, the District Court in its June 9, 2006 decision and order made some ambiguous remarks regarding plaintiffs' standing to pursue those claims. However, at subsequent status conferences, the District Court expressed the belief that its June 9, 2006 decision and order had not resolved the question of standing with respect to plaintiffs' constitutional claims.

Although certain non-constitutional claims remained pending before the District Court, plaintiffs

filed a notice of appeal on June 12, 2006. When those non-constitutional claims were mooted by new legislation, plaintiffs filed a second notice of appeal on June 26, 2006, on the theory that the June 9, 2006 decision and order had become final. In an order entered on August 9, 2006, the District Court determined that plaintiffs had never appealed from a final order and that it therefore retained jurisdiction to decide the issue of standing with respect to the constitutional claims. It then concluded that plaintiffs lacked standing, in part because they had not alleged an injury that would likely be redressed by a judgment in their favor. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The Court reasoned that the remedy for a constitutional violation would be to sever the Medicare provision not passed by the House of Representatives from the remainder of the DRA, leaving in force the student loan provisions allegedly causing harm to plaintiffs. The Court also reiterated that the enrolled bill rule required dismissal of plaintiffs' constitutional claims. At the end of the August 9, 2006 order, the District Court directed the Clerk to close the case. Plaintiffs filed a third notice of appeal on August 10, 2006.[5]

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5. Because plaintiffs' multiple notices of appeal ensure timeliness, and because we can *nostra sponte* address any argument on standing not presented to or decided by the District Court, we need not consider whether it was possible for plaintiffs to appeal at any time before August 9, 2006, or whether the District Court properly concluded that it retained jurisdiction to decide the standing issue.

Appendix A

DISCUSSION

A. Marshall Field

In *Marshall Field*, several importers protesting the assessment of duties under the Tariff Act of October 1, 1890 claimed that "the act was not a law of the United States." 143 U.S. at 665-66, 12 S.Ct. 495. The Supreme Court described the importers' principal contention as follows:

> The contention of the appellants is that [the] enrolled act, in the custody of the Secretary of State, and appearing, upon its face to have become a law in the mode prescribed by the Constitution, is to be deemed an absolute nullity, in all its parts, because-such is the allegation-it is shown by the Congressional record of proceedings, reports of committees of each house, reports of committees of conference, and other papers printed by authority of Congress, and having reference to [the bill in question], that a section of the bill, as it finally passed, was not in the bill authenticated by the signatures of the presiding officers of the respective houses of Congress, and approved by the President.

Id. at 668-69, 12 S.Ct. 495. In other words, the importers were arguing that neither house of Congress had passed a version of the bill identical to the enrolled bill. The importers "rest[ed] their contention" on the Journal Clause of the Constitution,

U.S. Const. art. I, § 5, cl. 3,[6] which they claimed made congressional journals "the best, if not conclusive evidence upon the issue as to whether a bill was, in fact, passed by the two houses of Congress." *Marshall Field*, 143 U.S. at 670, 12 S.Ct. 495.

The Supreme Court rejected this interpretation of the Journal Clause and stated that nothing in the Constitution "prescribe[s] the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude[s] Congress from adopting any mode to that end which its wisdom suggests." *Id.* at 671, 12 S.Ct. 495. Noting that the Constitution does not "expressly require bills that have passed Congress to be attested by the signatures of the presiding officers of the two houses," the Court observed that "usage, the orderly conduct of legislative proceedings and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication." *Id.* The Court then concluded that "when a bill, thus attested, receives [the President's] approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable." *Id.* at 672, 12 S.Ct. 495. Recognizing that separation-of-powers concerns

6. The Journal Clause states that "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal." U.S. Const. art. I, § 5, cl. 3.

were at issue, the Court elaborated that "[t]he respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated." *Id.*

The Supreme Court in *Marshall Field* admitted that the rule thereby established would allow the continued enforcement of legislation that had not been enacted in the manner prescribed by the Constitution. *See id.* at 675, 12 S.Ct. 495. However, it reasoned that

> [b]etter, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should at any and all times be liable to be put in issue and impeached by the journals, loose papers of the legislature, and parole evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable.

Id. (quoting *Sherman v. Story*, 30 Cal. 253, 275 (1866)).

In concluding its discussion of Congress's alleged failure to pass the precise text of the act in question, the Court set forth "a clear rule" requiring the judicial branch to treat an enrolled bill signed by the presiding officers of the House and Senate as conclusive evidence of the text passed by both houses of Congress. *Public Citizen*, 486 F.3d at 1350. Under *Marshall Field*, "it is not competent" for a plaintiff alleging

that a statute is void because Congress did not pass the exact text appearing in an authenticated enrolled bill "to show, from the journals of either house, from the reports of committees, or from other documents printed by authority of Congress," that the bills actually passed by the two houses of Congress differed from the enrolled bill. *Marshall Field,* 143 U.S. at 680.

The rule articulated by the Supreme Court in *Marshall Field* became known as the "enrolled bill rule" and has been described by our Court as "a longstanding rule, invoked by many courts, including the Supreme Court and our own Court." *United States v. Pabon-Cruz,* 391 F.3d 86, 99 (2d Cir.2004) (holding that the enrolled bill rule does not prevent courts from considering legislative history when determining how to interpret and apply statutory language). As we have observed, the enrolled bill rule "provides that [i]f a legislative document is authenticated in regular form by the appropriate officials, the court[s] treat [ ] that document as properly adopted." *Id.* (alterations in original) (quoting *United States v. Sitka,* 845 F.2d 43, 46 (2d Cir.1988) (quoting *United States v. Thomas,* 788 F.2d 1250, 1253 (7th Cir.1986) (citing *Marshall Field,* 143 U.S. at 672-73, 12 S.Ct. 495))) (internal quotation marks omitted).

The plain language of *Marshall Field* appears to foreclose plaintiffs' constitutional claims in the instant case, which would require our Court to look beyond the authenticated enrolled bill for evidence that the House and Senate did not pass identical texts. Yet plaintiffs present a variety of arguments

urging us to decide that *Marshall Field* does not mean what it says. They also assert that they have standing under the Constitution to pursue their claims. We conclude that plaintiffs' arguments regarding the inapplicability of the enrolled bill rule are without merit, and we note that it is for the Supreme Court rather than a court of inferior jurisdiction to determine whether the venerable enrolled bill rule requires revision in light of technological and political developments since *Marshall Field* was decided in 1892. We also conclude that a court may dismiss claims pursuant to the enrolled bill rule before addressing whether a plaintiff has standing.

B. The Enrolled Bill Rule Is a "Non-Merits Threshold Ground for Dismissal"

We first consider whether it is necessary for a court to determine if a plaintiff satisfies the "irreducible constitutional minimum of standing" before deciding whether the enrolled bill rule applies. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. We agree with the District of Columbia Circuit that "[a]t a minimum, the *Marshall Field* rule is . . . a non-merits threshold ground for dismissal" that cuts off judicial inquiry into a plaintiff's constitutional claims based on the alleged failure of Congress (whether one house or both) to pass the precise text of a statute. *Public Citizen*, 486 F.3d at 1349; *see Marshall Field*, 143 U.S. at 675, 12 S.Ct. 495 (recognizing that application of the enrolled bill rule will allow unconstitutional laws to survive). Like other rules that are "designed not merely to defeat the asserted claims, but to preclude judicial inquiry," *Tenet v. Doe*, 544 U.S. 1, 6 n. 4, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005), or that

"deny[ ] audience to a case on the merits," *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999), the enrolled bill rule may support dismissal of a claim before a court assesses its authority to hear that claim. *See Public Citizen*, 486 F.3d at 1345-49; *cf. Sinochem Int'l Co. v. Malaysia*, __ U.S. __, 127 S.Ct. 1184, 1188, 167 L.Ed.2d 15 (2007) (permitting dismissal on the ground of forum non conveniens before consideration of jurisdictional issues); *Tenet*, 544 U.S. at 6 n. 4, 125 S.Ct. 1230 (allowing dismissal of a suit involving covert espionage agreements on public policy grounds before consideration of jurisdictional issues); *Ellis v. Dyson*, 421 U.S. 426, 433-34, 95 S.Ct. 1691, 44 L.Ed.2d 274 (1975) (permitting abstention under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), before consideration of whether there is an Article III case or controversy).

As the District of Columbia Circuit pointed out in *Public Citizen*, because the enrolled bill rule is a "non-merits threshold ground for dismissal," *Public Citizen*, 486 F.3d at 1349, it "does not authorize a merits dismissal for failure to state a claim" under Fed.R.Civ.P. 12(b)(6). *id.* at 1348. Consequently, a district court need not accept as true the facts alleged in a plaintiff's pleadings when a defendant moves to dismiss pursuant to the enrolled bill rule. *Cf. McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir.2007) ("In reviewing a motion to dismiss under Fed.R.Civ.P. 12(b)(6) . . . , we accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the nonmoving party."). Rather, the district court must determine (1) whether the presiding officers of the

House and Senate in fact signed the enrolled bill, thereby attesting to its passage, and (2) whether the enrolled bill rule requires dismissal of a particular claim as a matter of law. A court of appeals would then review the district court's factual findings under a clearly erroneous standard and its legal conclusions *de novo*. *Cf. Gualandi v. Adams*, 385 F.3d 236, 240 (2d Cir.2004) ("In reviewing a district court's determination of whether it has subject matter jurisdiction, we review factual findings for clear error and legal conclusions *de novo*.").

In the instant case, there is no dispute as to whether the Speaker of the House of Representatives and the President Pro Tempore of the Senate signed the enrolled bill that would subsequently become the DRA. Thus, we need only review the District Court's legal conclusions regarding application of the enrolled bill rule to the particular claims at issue.

C. The Enrolled Bill Rule Was Not Dicta

Plaintiffs and *amicus* Public Citizen argue that the Supreme Court's holding in *Marshall Field* extended only to congressional journals and that the prohibition against considering all "other documents printed by authority of Congress," *Marshall Field*, 143 U.S. at 680, 12 S.Ct. 495, was merely expansive dicta. This argument was presented to the District of Columbia Circuit in *Public Citizen* and convincingly rejected by that court. We agree that " *Marshall Field*'s plain language and justification cannot be read to create a rule of dismissal limited to the claims of plaintiffs who rely primarily upon journals to rebut an attested enrolled bill." *Public Citizen*, 486 F.3d at

1351. The Supreme Court articulated an expansive rule in *Marshall Field* because such a rule was necessary to answer the expansive question before the Court, *see Marshall Field,* 143 U.S. at 668-69, 680, 12 S.Ct. 495, notwithstanding that the appellants' strongest argument lay in their interpretation of the Journal Clause. Moreover, neither the Supreme Court's concern for stability nor its attentiveness to the constitutional doctrine of separation of powers "applies solely to impeachment by journals." *Public Citizen,* 486 F.3d at 1351. Permitting litigants to impeach the text of an enrolled bill by other congressional documents would likewise create "uncertainty in the statute laws," *Marshall Field,* 143 U.S. at 675, 12 S.Ct. 495 (quoting *Sherman,* 30 Cal. at 275), and require courts to conduct inquiries that impinge upon the "respect due to coequal and independent departments," *id.* at 672, 12 S.Ct. 495. Finally, the Supreme Court's own subsequent interpretation of *Marshall Field*'s holding requires us to reject plaintiffs' argument that *Marshall Field* did nothing but prevent litigants from challenging the text of an enrolled bill through congressional journals. *See United States v. Munoz-Flores*, 495 U.S. 385, 391 n. 4, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990) ("The Court rejected [appellants'] interpretation of the Journal Clause, *holding that the Constitution left it to Congress to determine how a bil is to be authenticated as having passed.*" (emphasis added)).

Plaintiffs also argue that the scope of the holding of *Marshall Field* was cast into doubt by the Supreme Court's inspection of congressional journals in *United States v. Ballin*, 144 U.S. 1, 12 S.Ct. 507, 36 L.Ed. 321 (1892), a case decided on the same day as

Marshall Field. This argument, which would render *Marshall Field* meaningless with respect to the one source of evidence plaintiffs concede was at issue, is without merit. In *Ballin*, the Court considered whether another tariff act had been "legally passed." *Id.* at 3, 12 S.Ct. 507. The Court addressed whether a quorum of the House of Representatives had been present "to do Business," U.S. Const. art I, § 5, cl. 1, and whether the bill before the House received a sufficient number of votes. *See Ballin*, 144 U.S. at 3-9, 12 S.Ct. 507. The Court first observed that, as a general matter, "whenever a question arises in a court of law of the existence of a statute . . . , the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question." *Id.* at 3, 12 S.Ct. 507 (quoting *Gardner v. Collector*, 73 U.S. (6 Wall.) 499, 511, 18 L.Ed. 890 (Dec. Term 1867)). The Court then noted its decision in *Marshall Field* and stated "[i]t is unnecessary to add anything here to that general discussion." *Id.* at 4, 12 S.Ct. 507. *Ballin* in no way purported to disturb *Marshall Field*'s holding as expressed by the plain language of that case itself and reaffirmed by the Supreme Court in *Munoz-Flores*.

Indeed, the Supreme Court's analysis in *Ballin* appears to reinforce its reasoning in *Marshall Field*. In *Ballin*, the Court inspected the House's journal only after "[a]ssuming that by reason of [the Journal Clause] reference may be had to the journal, to see whether the yeas and nays were ordered, and if so, what was the vote disclosed thereby." *Id.* In contrast, the *Marshall Field* Court made plain that the

Constitution grants Congress full discretion in deciding how to authenticate the particular text of a bill passed by both houses. *See Marshall Field,* 143 U.S. at 671, 12 S.Ct. 495. Moreover, in *Ballin,* the Court noted that the House of Representatives had itself implemented a rule requiring that certain information regarding voting be recorded in the journal. *See Ballin,* 144 U.S. at 5, 12 S.Ct. 507. The Court respected the House's discretion "to determine its rules of proceedings," *id.* at 5, 12 S.Ct. 507, accepting as true the information contained in the journal even though it might be erroneous, *see id.* at 4, 12 S.Ct. 507. In the same way, the Court in *Marshall Field* respected Congress's discretion to prescribe the authentication of an enrolled bill's text, even though that text might not have actually passed both houses. *See Marshall Field,* 143 U.S. at 672, 675, 12 S.Ct. 495.

D. The Enrolled Bill Rule Has Not Been Overruled or Modified by the Supreme Court

Plaintiffs' principal contention on appeal is that, whatever *Marshall Field* meant in 1892, the Supreme Court has subsequently restricted its application "to cases where a constitutional requirement binding Congress is absent," Appellants' Reply Br. 1, or has at least "squarely confine[d] *Field* to a Journal Clause controversy," *id.* at 3. Plaintiffs' sole support for this argument is what Judge Edwards of the District of Columbia Circuit styled an "oblique footnote" in *Munoz-Flores. Public Citizen,* 486 F.3d at 1352. Like the District of Columbia Circuit, we too "are satisfied that the Court's decision in *Munoz-Flores* does not

purport to overrule or modify the enrolled bill rule." *Id.* at 1355.

In *Munoz-Flores,* a criminal defendant challenged the constitutionality of a provision of the Victims of Crime Act, 18 U.S.C. § 3013. He argued that the provision, "which requires courts to impose a mandatory special assessment on any person convicted of a felony misdemeanor," *Munoz-Flores,* 495 U.S. at 387, 110 S.Ct. 1964 (internal quotation marks omitted), was passed in violation of the Constitution's Origination Clause, which states that "[a]ll Bills for raising Revenue shall originate in the House of Representatives," U.S. Const. art. I, § 7, cl. 1. *See Munoz-Flores,* 495 U.S. at 387, 110 S.Ct. 1964. The Supreme Court eventually determined that the provision did not violate the Origination Clause because it was not a bill for raising revenue. *See id.* at 401. However, before doing so, the Court discussed whether the case was justiciable under the "political question doctrine," ultimately concluding that it was. *See id.* at 389-96.

Justice Scalia, in an opinion concurring in the judgment, stated that *Marshall Field* prohibits judicial inquiry into the origination of a statute where an authenticated enrolled bill contains the designation "H.J. Res.," an abbreviation for "House Joint Resolution." *See id.* at 408-10, 110 S.Ct. 1964 (Scalia, J., concurring in the judgment). The majority addressed Justice Scalia's position in a footnote containing the majority opinion's lone mention of *Marshall Field.* The footnote read:

> [Justice Scalia] contends that Congress' resolution of the constitutional question in passing the bill bars this Court from independently considering that question. The only case he cites for his argument is *Marshall Field & Co. v. Clark*. But *Field* does not support his argument. That case concerned "the nature of the evidence" the Court would consider in determining whether a bill had actually passed Congress. Appellants had argued that the constitutional Clause providing that "[e]ach House shall keep a Journal of its Proceedings" implied that whether a bill had passed must be determined by an examination of the journals. The Court rejected that interpretation of the Journal Clause, holding that the Constitution left it to Congress to determine how a bill is to be authenticated as having passed. In the absence of any constitutional requirement binding Congress, we stated that "[t]he respect due to coequal and independent departments" demands that the courts accept as passed all bills authenticated in the manner provided by Congress. Where, as here, a constitutional provision *is* implicated, *Field* does not apply.

Munoz-Flores, 495 U.S. at 391 n. 4 (citations omitted).

Plaintiffs interpret this footnote as rendering the enrolled bill rule inapplicable to their constitutional claims under the Bicameralism and Presentment

Clause and the Appropriations Clause. We disagree. Although "the language of the *Munoz-Flores* footnote is cumbersome, making it difficult to discern precisely what the Court meant to say," *Public Citizen*, 486 F.3d at 1354, we think it clear that the Court did not intend to change the fundamental parameters of the enrolled bill rule established in *Marshall Field*—namely, that courts must "accept, as having passed Congress, all bills authenticated" by the signatures of the presiding officers of the House and Senate, *Marshall Field*, 143 U.S. at 672. The *Munoz-Flores* "oblique footnote" repeatedly refers to the basic constitutional deficiency alleged in *Marshall Field*, which was that the statute in question had not passed both houses of Congress in a form identical to the enrolled bill. That same alleged deficiency underlies plaintiffs' claims in the instant case. Moreover, as mentioned above, *see* page 12 *ante*, the footnote describes *Marshall Field*'s holding in broad terms, providing no indication that it applies only to particular types of evidence. Whatever plausible alternative interpretations may be supported by the language of the "oblique footnote," plaintiffs' reading is not one of them.[7] *See Public Citizen*, 486 F.3d at

7. In other words, the *Munoz-Flores* footnote refuses to extend, but does not retract, the enrolled bill rule. That said, we do agree with plaintiffs that the Supreme Court has been less than clear in explaining why courts may probe congressional documents when adjudicating some types of constitutional claims but not others. In the context of a claim that seeks to impeach the authenticated text of an enrolled bill, the Court may regard as unique the "usage, the orderly conduct of legislative proceedings, and the rules under which the [houses of Congress] have acted since the organization

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1354-55 (discussing what the *Munoz-Flores* Court might have meant when it stated that a constitutional provision was not implicated in *Marshall Field*).

E. We May Not Create Exceptions to the Enrolled Bill Rule Based on Technological and Political Developments Since Marshall Field Was Decided

Plaintiffs and *amici* offer two additional reasons why the enrolled bill rule should not apply in the instant case: (1) the engrossed bill, whose production is required by statute, is more reliable than the congressional documents presented as evidence of a constitutional violation in *Marshall Field*; and (2) plaintiffs allege a conspiracy to subvert the Constitution by the presiding officers of Congress and the President. Neither of these arguments is availing.

First, although technological advances in printing and copying since the late nineteenth century may have removed some of the sources of unreliability in congressional documents, the facts alleged by plaintiffs in this case reveal that even engrossed bills

(Con'td)

of the government, requir[ing] that mode of authentication." *Marshall Field*, 143 U.S. at 671. Or the Court may consider the textual inconsistencies invoked in a bicameralism challenge to be a greater source of "uncertainty in the statute laws of the land," *id.* at 675 (quoting *Sherman*, 30 Cal. at 275), than other grounds for constitutional challenges. In any event, our task is to apply clearly established Supreme Court precedent, not to speculate on the reasons the Supreme Court might have had for creating this precedent.

printed today are subject to error or mishandling. Indeed, such advances may provide new ways to alter a bill's text during the legislative process. Additionally, while the Supreme Court in *Marshall Field* contemplated that Congress could change its internal bill authentication procedure if it wanted to, *see Marshall Field*, 143 U.S. at 675, 12 S.Ct. 495 (quoting *Sherman*, 30 Cal. at 275, for the proposition that departure from the enrolled bill rule is required in certain States because there exists "some express constitutional or statutory provision requiring some relaxation of the rule"), Congress has not done so. Nothing in 1 U.S.C. § 106, expressly or otherwise, limits the longstanding authority of the presiding officers of the House and Senate to attest to the passage of an enrolled bill's text. *See* page 4 *ante* (quoting 1 U.S.C. § 106).

Second, we do not agree with plaintiffs' argument (supported by several members of the House of Representatives acting as *amici*) that *Marshall Field* creates an exception to the enrolled bill rule in certain cases involving allegations that the presiding officers of Congress and the President of the United States conspired to violate the Constitution by enacting legislation that had not passed both the House and Senate. As it happens, the Supreme Court in *Marshall Field* responded to the contention that under the enrolled bill rule "it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress":

> But this possibility is too remote to be seriously considered in the present inquiry.

> It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills, and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution.

Marshall Field, 143 U.S. at 672-73. Plaintiffs and *amici* seize upon the Court's statement that the possibility of a conspiracy was "too remote to be considered in the present inquiry," arguing that where the likelihood of a conspiracy is greater, the enrolled bill rule does not apply. Yet the Court's next sentence warned that "[j]udicial action based upon . . . a suggestion [of conspiracy] is forbidden by the respect due to a co-ordinate branch of the government." *Id.* at 673, 12 S.Ct. 495. In light of the separation-of-powers concerns at the forefront of *Marshall Field,* which are surely undiminished by the passage of time, we do not think it plausible that the judicial branch must, before deciding if the enrolled bill rule applies, conduct threshold inquiries into how likely it was for a particular set of legislative and executive actors to conspire in alleged constitutional violations. Whether the enrolled bill rule has come to serve as an incentive for politicians to avoid the rigors of constitutional law-making is a different question. The answer might provide a policy argument against strict application of the enrolled bill rule, but we are bound to follow Supreme Court precedent as it currently exists.

In the last analysis, even if plaintiffs' arguments support the creation of exceptions to the enrolled bill

rule in some circumstances (or militate toward abandoning the rule altogether), we are not at liberty to depart from binding Supreme Court precedent "unless and until [the] Court reinterpret[s]" that precedent. *Agostini v. Felton,* 521 U.S. 203, 238, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *accord United States v. Quinones,* 313 F.3d 49, 62 n. 10 (2d Cir. 2002). Plaintiffs' constitutional claims are therefore foreclosed by *Marshall Field,* and dismissal by the District Court was appropriate.

* * *

For the foregoing reasons, the judgment of the District Court is **AFFIRMED**.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED AUGUST 9, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

06 Civ. 2979 (RMB)

ONESIMPLELOAN, CARINA D. BALL and NATHAN BAZYK,

Plaintiffs,

-against-

U.S. SECRETARY OF EDUCATION and SECRETARY' S REGIONAL REPRESENTATIVE FOR REGION II,

Defendants.

ORDER

I. Background

On or about April 18, 2006, Plaintiffs OneSimpleLoan, Carina D. Ball, and Nathan Bazyk ("Plaintiffs") filed a complaint ("Complaint") against the U.S. Secretary of Education ("Secretary") and the Secretary's Regional Representative for Region II, which includes New York ("Defendants"), alleging, under Count I, that the Defendants prematurely and unlawfully terminated so-called two-step loan reconsolidations and, under Count II, that the Deficit

Reduction Omnibus Act of 2005, P.L. 109-171 (the "DRA") is unconstitutional because somewhat differing versions of the DRA were allegedly passed by the House of Representatives and the Senate before it was signed into law by the President of the United States on or about February 8, 2006. Familiarity with the underlying facts of this case is assumed.

On June 9, 2006, the Court issued a Decision and Order ("Decision and Order") (1) dismissing Plaintiffs' claims under Count I "insofar as they seek injunctive relief, or (injunctive) relief "in the nature of a mandamus"; (2) denying Defendants' motion to dismiss and Plaintiffs' motion for summary judgment on Plaintiffs' claims "under Count I for declaratory relief and for relief under the [Administrative Procedures Act]"; and (3) granting Defendants' motion to dismiss Count II. (Decision and Order at 18.) On June 12, 2006, Plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit ("June 12 Notice").

On or about June 15, 2006, Congress passed the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006, P.L. 109-239 ("ESA"), which contained a provision repealing the so-called "Single Holder Rule," effective June 15, 2006. The parties argue that the passage of the ESA caused Count I of the Complaint – which centered on the Department of Education's allegedly improper enforcement of the Single Holder Rule – to become moot. (*See* Plaintiffs' Post-Appeal Reply Memorandum Regarding Count II ("Reply") at 1 ("Count 1, in its entirety, was rendered moot by the passage of the [ESA] . . .")

Appendix B

A second Notice of Appeal was filed with the Court of Appeals on June 26, 2006 ("June 26 Notice").

On June 27, 2006, a conference was held at which the Court directed the parties to re-brief the issue of Plaintiffs' standing to pursue Count II in light of the ESA, which had not been resolved by the Court in the Decision and Order. *See* Decision and Order at 17 ("Assuming, without deciding, that Plaintiffs may have suffered 'an injury in fact' . . ."); Transcript of Proceedings dated June 27, 2006 ("Tr.").) It had been the Court's intention to decide the standing issue on Count II, after resolving the open Count I issues.

In their Post-Appeal Memorandum Regarding Count II dated July 7, 2006 ("Pl. Mem."), Plaintiffs argue that "[t]ransfer of jurisdiction to the Court of Appeals precludes this Court from taking any substantive action in respect to the subject of the appeal, including supplementing or modifying the Decision and Order being appealed." (Pl. Mem. at 7.) Defendants, in response, argue, among other things, that "[t]his Court retains jurisdiction to address standing issues as to Count II," and that both the individual Plaintiffs and OneSimpleLoan cannot demonstrate standing to pursue Count II. (Defendants' Memorandum Regarding Standing dated July 18, 2006 ("Def. Mem.") at 1, 9-17.)

For the following reasons, the Court finds that Plaintiffs do not have standing to challenge the DRA.

Appendix B

II. Legal Standard

"The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *United States v. Hays*, 515 U.S. 737, 742 (U.S. 1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231 (1990).)

"The irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal citations and quotations omitted.)

III. Analysis

Jurisdiction Following Notice of Appeal

As a preliminary matter, the Court believes that it retains jurisdiction to determine whether Plaintiffs have standing to pursue Count II because the Decision and Order, which did not dispose of all of Plaintiffs' claims, was not a final order. *See* Decision and Order at 18 ("As to Plaintiffs' claims under Count I for

declaratory relief and for relief under the APA, both Defendants' motion to dismiss and Plaintiffs' motion for summary judgment are denied.").) *See Satcom Int'l Group PLC v. Orbcomm Int'l Partners*, 55 F. Supp. 2d 231, 234 (S.D.N.Y. 1999). The Decision and Order perceived a link between Counts I and II based on Defendants' (persuasive) argument that "if the Court finds . . . that the Department has properly barred Plaintiffs' two-step refinancing under the law as it existed prior to the DRA [i.e., if Plaintiffs succeed on Count I], the Plaintiffs will lack standing to pursue Count II." (Decision and Order at 15.) Moreover, "the divestiture of jurisdiction rule is . . . not a per se rule." *United States v., Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996). Rather, "it is a judicially crafted rule rooted in the interest of judicial economy, designed 'to avoid confusion or waste of time resulting from having the same issues before two courts at the same time.' Hence, its application is guided by concerns of efficiency and is not automatic." *Id.* (internal citations omitted).

Standing

As to the individual Plaintiffs, Defendants are unopposed in arguing that, with respect to Count II, "[they] have demonstrated the 'injury in fact' and 'causation' elements of standing, but cannot demonstrate 'redressability' because the remedy for the constitutional violation they allege would be simply to [sever] the one provision of the DRA that allegedly was not approved by both Houses of Congress." (Def. Mem. at 1.) They have not shown that it would "be likely, as opposed to merely speculative that the injury will be redressed by a

favorable decision." *Lujan*, 504 U.S. at 561. As the Court stated in the July 9 Order, "If the DRA were held unconstitutional, Congress might not choose to change the restrictions allegedly placed on the two-step loan reconsolidation process . . . It may be equally probable that Congress would resolve the Medicare equipment discrepancy . . . and pass an otherwise identical bill." (Decision and Order at 17.) Plaintiffs have not shown "that the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative.'" *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663-664 (1993) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

Defendants are also unopposed in arguing that OneSimpleLoan, with respect to Count II, "lacks standing because it cannot satisfy the 'injury in fact' requirement . . . [because] the principal harm asserted by OneSimpleLoan is nothing more than the lost opportunity to recommend this particular type of student-loan refinancing to its customers. Although OneSimpleLoan asserts that it suffers harm as a student loan lender, that is incorrect: OneSimpleLoan admits that it is not a student loan program lender, but merely an investor in a trust that makes such loans."[1] (Def. Mem. at 17 (internal citations omitted).)

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1. Although OneSimpleLoan has stated in the course of this litigation that it is, in fact, "a lender, having U.S. Department of Education Lender Identification Number 834205," (Reply Declaration of Paul J. Simino dated May 10, 2006, ¶ 3), it does not refute Defendants' assertion that this lender number "was issued to Deutsche Bank [and] . . .

(Cont'd)

Appendix B

In addition to the Constitutional standing requirements, "[t]he Supreme Court has noted, as a 'prudential principle[ ][,] . . . that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Connecticut v. Physicians Health Servs. of Connecticut, Inc.*, 287 F.3d 110, 116 (quoting *Valley Force Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982)). As "merely an investor in a trust that makes [student loans]," (Def. Mem. at 17), OneSimpleLoan appears not to have "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Burns v. Warwick Valley Central School Dist.*, 166 F. Supp. 2d 881, 888 (S.D.N.Y. 2001) (citation omitted). Even assuming, *arguendo*, that OneSimpleLoan could demonstrate injury in fact, it, like the individual Plaintiffs, cannot meet the requirement of redressability. *See Lujan*, 504 U.S. at 561.

(Cont'd)

Deutsche Bank, not OneSimpleLoan, is the responsible lender for FFEL Program purposes." (Defendants' Memorandum of Law in Opposition to Plaintiffs' Amended Motion for Summary Judgment and for a Preliminary Injunction Pending Final Judgment and in Support of Defendants' Cross-Motion to Dismiss at 20, n.9.) OneSimpleLoan has earlier described itself as "a student loan marketing company" with a "corporate mission," among other things, "to [] provide each of its clients with unbiased and objective recommendations about his or her student loan consolidation package." (Declaration of Paul J. Simino dated April 17, 2006, ¶ 5, 8.)

In sum, the Court holds that neither the individual Plaintiffs nor OneSimpleLoan have standing to challenge the constitutionality of the DRA. And, as stated in the Decision and Order, even if Plaintiffs could demonstrate standing, "Count II is subject to dismissal under the Enrolled Bill Rule announced in *Field v. Clark* [143 U.S. 649 (1982)]." (*See* Decision and Order at 17.)

IV. Decision & Order

For the reasons stated, Count I is dismissed as moot and the Court's previous dismissal of Count II in its Decision and Order dated June 9, 2006 is modified to reflect Plaintiffs' lack of standing. The Clerk is respectfully requested to close this case.

Dated: New York, NY
August 9, 2006

s/ Richard M. Berman
RICHARD M. BERMAN, U.S.D.J.

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED JUNE 9, 2006

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 06 Civ. 2979 (RMB)

ONE SIMPLE LOAN, CARINA D. BALL and NATHAN BAZYK,

Plaintiffs,

-against-

U.S. SECRETARY OF EDUCATION and SECRETARY'S REGIONAL REPRESENTATIVE FOR REGION II,

Defendants.

DECISION AND ORDER

I. Introduction

On or about April 18, 2006, Plaintiffs OneSimpleLoan, Carina D. Ball, and Nathan Bazyk commenced this action against the U.S. Secretary of Education (the "Secretary") and the Secretary's Regional Representative for Region II (which includes New York), alleging that the Defendants prematurely and unlawfully terminated so-called two-step loan reconsolidations, and that the Deficit Reduction Omnibus Act of 2005, P.L. 109-171 (the "DRA") (a budget reconciliation measure which implicates, *inter*

alia, agriculture, housing, transportation, Medicare, and education in the United States), is unconstitutional because somewhat differing versions of the DRA were allegedly passed by the House of Representatives and the Senate before the DRA was signed into law by the President of the United States. (The Senate vote on the measure was 50/50 and the tie was broken by the vote of the Vice President.)[1]

On May 18, 2006, Plaintiffs filed an Amended Motion for Summary Judgment and Preliminary Injunction ("Pl.Mot."). On May 22, 2006, Plaintiffs filed a Memorandum in Support of Amended Motion

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1. Plaintiff OneSimpleLoan is "an independent professional student loan firm that has consolidated millions of dollars in Federal student loans for FFEL [Federal Family Education Loan] borrowers with commercial lenders." Plaintiffs Ball and Bazyk are individual FFEL loan borrowers who are "eligible to refinance, and would have refinanced . . . using the two-step reconsolidation so as to obtain a lower rate and/or better borrower benefits, but for the action of the defendants which unlawfully terminated two-step reconsolidations." (Complaint ¶¶ 2-4.)

"The two-step process by which a borrower who has only a FFEL consolidation loan may refinance that loan as a different FFEL consolidation loan through a two-step process that involves the Department of Education." (Complaint ¶ 14.) 'Two-step' reconsolidations allow a borrower who only has a loan under the [FFEL] program to refinance it through a mechanism which involves reconsolidating the old FFEL consolidation loan into a Direct Loan Program ("Direct") consolidation loan (held by the Department of Education) and then immediately reconsolidating that Direct consolidation loan as a new FFEL consolidation loan." (Complaint ¶ 15.)

for Summary Judgment and for a Preliminary Injunction Pending Final Judgment ("Pl.Mem.") and Plaintiffs' Statement of Undisputed Material Facts Pursuant to Local Rule 56.1(a) ("Pl.Stmt.").

At the core of Plaintiffs' case is their application for injunctive relief "mandating that [Defendants] promptly and completely process Direct consolidation loan applications and [loan verification certificates ("LVC")] to allow the refinancing of [Federal Family Education Loan ("FFEL")] consolidation loans of borrowers who have only such loans through "two step" reconsolidation so long as the borrower submits a two-step application on or before June 30, 2006." (Pl. Mot. at 2.)

As to Count I of the complaint, Plaintiffs seek a preliminary injunction "so as to require that the Department of Education maintain the *status quo ante* March 31, 2006, of the federal Higher Education Act [20 U.S.C. 1001, *et seq.* (the "HEA")] through at least June 30, 2006, and continue the refinancing of federal education loans made under the [FFEL] and Direct loan programs through 'two step reconsolidation' and to process all loan applications and loan verification certificates so long as the loan applications are received on or before June 30, 2006." (Pl. Mot. at 3.)

Plaintiffs also seek summary judgment on Count I "(i) in the nature of a mandamus that [ ] the Department of Education promptly and completely process [Direct] consolidation loan applications and [LVCs] to allow the refinancing of [FFEL] program consolidation loans of borrowers who have only such

loans through 'two step' reconsolidation so long as the borrower submits a two-step application on or before June 30, 2006, (ii) declaring [the] "Dear Colleague" letter designated FP 06-03 [dated March 17, 2006 and signed by the Assistant Secretary for Postsecondary Education and the Chief Operating Officer for Federal Student Aid ("FP 06-03")] unlawful and invalid insofar as it purports to terminate refinancing through two-step reconsolidation as of March 31, 2006, and/or refuses to process after such date the Direct consolidation loan applications and/or LVCs to allow such refinancing, (iii) granting such other judicial review of [FP 06-03] under the Administrative Procedure Act [5 U.S.C. § 553, (the "APA")] as may be appropriate to set aside FP 06-03 insofar as it purports to terminate refinancing through two-step reconsolidation as of March 31, 2006, and/or refuses to process after such date the Direct consolidation loan applications and/or LVCs to allow the such refinancing and/or (iv) permanently enjoining the defendants [and] mandating that they promptly and completely process Direct consolidation loan applications and LVCs to allow the refinancing of FFEL consolidation loans of borrowers who have only such loans through 'two step' reconsolidation so long as the borrower submits a two step application on or before June 30, 2006." (Pl. Mot. at 2.)

As to Count II of the complaint, Plaintiffs seek to enjoin the "enforcement of the DRA provisions that disallow two-step reconsolidation of FFEL consolidation loans and/or otherwise limit education loan rights that exist under the law excluding the provisions of the DRA." (Pl. Mot. at 3.) (*See* further discussion, Part II(B), *infra.*)

Plaintiffs also seek summary judgment under Count II(i) declaring the DRA unconstitutional; (ii) permanently enjoining the Defendants and mandating that they "promptly and completely process Direct consolidation loan applications and LVCs to allow the refinancing of FFEL consolidation loans of borrowers who have only such loans through 'two step' reconsolidation"; and (iii) permanently enjoining the Defendants from implementing the provisions of the DRA that increase education loan interest rates "and/or otherwise limit education loan rights that exist under the law excluding the provisions of the DRA." (Pl. Mot. at 3.)

On May 23, 2006, Defendants moved to dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure ("Fed. R. Civ.P."), and filed a Memorandum of Law in Opposition to Plaintiffs' Amended Motion for Summary Judgment and for a Preliminary Injunction Pending Final Judgment and in Support of Defendants' Cross-Motion to Dismiss ("Def.Mem.").[2] Defendants argue, among other things, that (1) the anti-injunction clause applicable to the FFEL program, contained in 20 U.S.C. § 1082(a)(2) ("§ 1082"), "deprives this Court of jurisdiction to issue injunctions or coercive declaratory judgments against the Department in connection with the student loan program at issue here"; (2) "even absent a jurisdictional bar . . . as a matter of law Plaintiffs are not entitled to relief"; (3) Plaintiff OneSimpleLoan is without standing to pursue Count I "because the

2. The parties have not yet conducted discovery to the Court's knowledge.

FFEL program protects the interests of students and their parents"; and (4) any injunctive relief sought by the Plaintiffs "is overbroad and any relief should be narrowly tailored." (Def. Mem. at 1.) Central to Defendants' argument is the proposition that the Department relied upon a statutory provision of the FFEL program known as the Single Holder Rule, 20 U.S.C. § 1078-3(b)(1)(A) in setting March 31, 2006 as the deadline after which certain FFEL Consolidation Loan arrangements, specifically the two-step refinancing process, are prohibited. (Opposition at 3.) Defendants state that FP 06-03 is consistent with past policy and is lawful, "making clear that after March 31, 2006 . . . the Single Holder Rule would be enforced against certain FFEL Consolidation Loan arrangements." (Opposition at 7.)

Defendants also argue that Count II of the complaint should be dismissed because (1) Plaintiffs lack standing to challenge the constitutionality of the DRA; and (2) pursuant to the so-called Enrolled Bill Rule, enunciated in *Field v. Clark,* 143 U.S. 649 (1892), "the undisputed fact that the Speaker of the House and President Pro Tem of the Senate certified the passage of the DRA is binding on the Judiciary and conclusive of the issue whether the law in fact passed." (Def. Mem. at 1.)

Defendants also filed a counterstatement of fact in response to Plaintiffs' Rule 56.1(a) statement pursuant to Local Rule 56.1(b) ("Def.Stmt.").[3]

3. Defendants appear to dispute (some) facts contained in Plaintiffs Rule 56.1 statement, including the circumstances (Cont'd)

Plaintiffs filed a Reply Memorandum of Law on May 25, 2006 ("Reply"), arguing, among other things, that "Defendants' assertion that the FFEL 'anti-injunction rule' bars the Court from granting the plaintiffs any remedy rates short shrift," and the Court "has the Constitutional duty to strike the DRA down." (Reply at 1, 8.) Oral argument was held on June 8, 2006. (*See* Transcript of Proceedings, dated June 8, 2006 ("6/8/06 Tr.").)

For the following reasons, Defendants' motion to dismiss is granted in part and denied in part, and Plaintiffs' motion for summary judgment is denied.

II. Background

The following facts are undisputed, unless otherwise noted:

A) Count I

Since 1997, when Congress adopted the Emergency Student Loan Consolidation Act of 1997, P.L. No. 105-78, § 609 ("ESLCA"), the U.S. Department of Education has processed the [LVCs] necessary to consolidate Direct education loans, including Direct consolidation loans into FFEL consolidation loans." (Pl.Stmt.¶ 2.) Between March 1998 and March 17, 2006, the Department of Education posted a series of "Dear Colleague Letters" concerning reconsolidation of direct loans. (Pl. Stmt.

(Cont'd)
and interpretation of the Department's decision to enforce the Single Holder Rule. (*See* Pl. Stmt.; Def. Stmt. *See also* Transcript of Proceedings, dated June 8, 2006.)

¶ 3-6; Def. Stmt. ¶ 16-21.) The parties dispute whether these Dear Colleague Letters are consistent with FP-06-03, which "effectively prevents the reconsolidation of FFEL consolidation loans through a two step process by which a borrower with only a FFEL consolidation loan first reconsolidates that FFEL consolidation loan into a Direct consolidation loan; and then reconsolidates the resulting Direct consolidation loan into a new FFEL consolidation loan." (Pl.Stmt.¶ 8.) On March 24, 2006, the Department sent an e-mail which states that "If the borrower has no FFEL loans, they can consolidate with any FFEL lender because the single holder rule would not apply." (Pl. Stmt. ¶ 7; Reply Declaration of John J. Witmeyer III, dated May 11, 2006, Exhibit B ("Witmeyer Dec., 5/11/06, Ex __").) (Defendants dispute Plaintiffs' statement that the Department sent the email, but "but do not dispute that Pamela Moran, an employee of the Department, sent the e-mail." (Def.Stmt.¶ 7.))

Defendants dispute Plaintiffs' contention that ESLCA "eliminated otherwise applicable restrictions on reconsolidation of [Direct] loans." (Def.Stmt.¶ 1.) Defendants contend that a backlog of Direct consolidation loan applications led to the passage of the ESLCA, which "for the first time authorized Direct Loans to be consolidated into FFEL Consolidation Loans." (Opposition at 15.) "In light of the circumstances of the law's adoption, the Department has interpreted the law to permit borrowers with multiple, non-consolidated Direct Loans to consolidate those loans by means of a FFEL Consolidation Loan, notwithstanding the Single Holder Rule." (Opposition at 15; Def. Stmt. ¶ 2.)

Defendants also state that the "practice of refinancing a single [Direct loan] by means of a FFEL Consolidation Loan was not at issue at the time of the enactment of the [ESLCA.]" (Def.Stmt.¶ 2.) Defendants contend that in 2004, the "Department's Office of Federal Student Aid stopped processing LVCs for loans where a borrower was attempting to re-consolidate a single Direct Consolidation Loan by means of a FFEL Consolidation Loan. (Def.Stmt. ¶ 2.) And, "on August 26, 2004, in keeping with the Department's other statements on the Single Holder Rule, the Department announced that it would continue to process such LVCs until 'Congress has spoken on the issue.' " (Def.Stmt.¶ 2.) On March 17, 2006, "after Congress had 'spoken to the issue,' the Department issued a Dear Colleague Letter [FP 06-03] describing its intention to stop processing LVCs . . ." (Def.Stmt.¶ 2.)

B) Count II

At the core of Count II is a discrepancy which appears to have occurred in connection with the passage by the Senate and the House of Representatives of a bill known as 109th Cong. S.1932 (the "Bill"), and which became the DRA. Apparently, on December 21, 2005, the United States Senate passed a version of the Bill which states in Section 5101 that a time period applicable to certain durable medical equipment is 13 months. (Pl.Stmt.¶ 9.) On February 1, 2006, the House of Representatives passed a version of the Bill containing the same durable medical equipment provision, but stating the time period was 36 (not 13) months. (Pl. Stmt. ¶ 11; Supplemental Declaration of John J. Witmeyer, dated

May 18, 2006, Exhibit A ("Witmeyer Dec. 5/18/06, Ex __").) "After the Bill voted on by the House of Representatives was returned to the Senate, someone in the employ of Congress modified the Bill as passed by the House of Representatives so that the 36 month provision in the Bill as passed by the House was changed [back to] 13 months." (Pl.Stmt.¶ 13.) "The only thing we do not know is precisely, by name, date and circumstance, which specific individuals knew what, when, and which of them altered the House passed Bill so that it falsely appeared to match that of the Senate." (Pl. Mem. at 20.) "When the Speaker of the House, the Senate [sic] Pro Tem of the Senate and the President of the United States signed the enrolled version of the Bill known as 109 Cong. S.1932, they knew that it was not identical to the Bill passed by the House of Representatives on February 1, 2006, and they feared that if the House were to vote on an amended Bill that would be identical to the version of the Bill that the Senate had passed the amended Bill would not pass the House of Representatives." (Pl.Stmt.¶ 14.) On February 8, 2006, the President "signed the Bill with the 13 month provision as PL 109-171. On that same day the Senate passed Concurrent Resolution 80 to resolve the problem. The House of Representatives did not pass the Senate's proposed Concurrent Resolution." (Pl.Stmt.15.)

III. Legal Standards

A) Motion to Dismiss

When considering a motion to dismiss pursuant to Fed.R.Civ.P. Rules 12(b)(1) and 12(b)(6), the court

"must accept the factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff." *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir.1996). However, "[d]ismissal for failure to state a claim is proper where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002).

B) Injunctive Relief

"To secure a preliminary injunction in district court, the moving party must demonstrate '(1) that it will be irreparably harmed in the absence of an injunction, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case to make it a fair ground for litigation, and a balance of hardships tipping decidedly in its favor. '" *Mony Group, Inc. v. Highfields Capital Mgmt., L.P.*, 368 F.3d 138, 143 (2d Cir.2004) (quoting *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 149 (2d Cir. 1999)).

C) Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106

S.Ct. 2548, 91 L.Ed.2d 265 (1986); *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 117 F.3d 674, 676 (2d Cir.1997). The Court must "construe the record in the light most favorable to the non-moving party and draw[ ] all inferences in that party's favor." *Boguslavsky v. Kaplan*, 159 F.3d 715, 719 (2d Cir.1998). A genuine issue of material fact exists if "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

IV. Analysis

A) Count I

1) Jurisdiction

Defendants argue in their Opposition that the "relief sought by Plaintiffs in Count I of their complaint is barred by 20 U.S.C. § 1082(a), the anti-injunction provision of the [FFEL Program, 20 U.S.C. § 1071, et seq.]." Plaintiffs argue that they are entitled to injunctive relief because § 1082(a)(2) "does not prevent an injunction where the Secretary acts outside the scope of her authority." (Reply at 2.)

Section 1082 reads, in pertinent part:

(a) In the performance of, and with respect to, the functions, powers, and duties vested in him by this part, the [Secretary of Education] may-

(2) sue and be sued . . . but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Secretary . . .

"This partial waiver of sovereign immunity must be strictly construed in favor of the Secretary." *Coalition of New York State Private Career Schools, Inc. v. Riley*, 1996 WL 678453, *2 (N.D.N.Y.1996) (citing *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 137 (1991)). "The dispositive issue, then, is what constitutes an action outside of authority for the purpose of Section 1082." *Id.* The Court of Appeals for the Second Circuit has imposed a high bar to the application of this exception, "stressing the fundamental distinction 'between the exercise of a function or power that is clearly outside the statutory authority [of the Secretary of Education] on the one hand, and improperly or even unlawfully exercising a function or power that is clearly authorized by statute on the other . . ." *Id.* (quoting *Volges v. Resolution Trust Corporation*, 32 F.3d 50, 53 (2d Cir.1994)). The upshot here is that the Court lacks jurisdiction to issue an injunction (or "other similar process"), under § 1082(a)(2), where the Secretary "is colorably acting within [her] enumerated powers." *Gross v. Bell Sav. Bank PaSA*, 974 F.2d 403, 408 (3d Cir.1992).

The Secretary's interpretation and enforcement of the Single Holder Rule certainly does not appear to constitute an action outside of her authority.[4] *See Calise Beauty School, Inc. v. Riley*, 941 F.Supp. 425, 428 (S.D.N.Y.1996). Plaintiffs argue that the "Secretary of Education gave no notice to education

4. The Secretary, *inter alia*, is "authorized to make, promulgate, issue, rescind, and amend rules and regulations," and to "prescribe such regulations as may be necessary to carry out the purposes of [the FFEL program]." (*See* 20 U.S.C. § 1221e-3; 20 U.S.C. 1082(a)(1).)

loan borrowers that the Department would be ending years of continuing two-step loan reconsolidations in the short span of two weeks, and would thereby [eliminate] the statutorily authorized two-step reconsolidation process three full months prior to the end specified by the DRA, as the Department itself interprets it." (Pl. Mem. At 11.) Defendants counter, persuasively at this stage of the litigation, that the March 31, 2006 deadline imposed by the Secretary "underscored the Department's longstanding commitment to enforcing the Single Holder Rule," a statutory provision of the FFEL program which appears to bar the second step of the two-step reconsolidation process. (Opposition at 4.) *See* 20 U.S.C. § 1078-3(b)(1)(A). The DRA, according to the Defendants, "did not contain provisions eliminating or narrowing the Single Holder Rule." (Opposition at 6.) Rather, the DRA "imposed additional restrictions that-after their July 1, 2006 effective date-will specifically prohibit the first step of two-step refinancing." (Opposition at 6.)

Defendants also argue that, upon these facts, the "plain language of § 1082(a)(2) applies not only to 'injunctions' but also to 'other similar process,' " and that Plaintiffs' requests for relief in the nature of a mandamus (and for declaratory relief) should also be barred by § 1082. (Opposition at 11-12.) Plaintiffs counter that they are entitled to relief "in the nature of a mandamus" because "the individual that considers himself injured has a right to resort to the laws of his country for a remedy." (Pl. Mem. at 3, quoting *Marbury v. Madison*, 5 U.S. 137, 166 (1803).)

Plaintiffs' requested relief "in the nature of a mandamus" appears to the Court to fall squarely within the meaning of the phrase "other similar process" in § 1082(a)(2) because requiring the Secretary to "accept invalid FFEL Consolidation Loans . . . is the functional equivalent of an injunction." (Opposition at 12.) *See American Ass'n of Cosmetology Schools v. Riley*, 170 F.3d 1250, 1254 (9th Cir.1999).[5]

2) Plaintiffs' Claims for Declaratory Relief and for Relief under the Administrative Procedure Act, 5 U.S.C. § 553

Plaintiffs' request that the Court issue a declaratory judgment "declaring FP 06-03 unlawful and invalid" does not appear to the Court to be barred by § 1082. (Pl. Mot. at 2.) That is, courts have held that § 1082 does not necessarily bar declaratory relief. "An injunction is a coercive order by a court directing a party to do or refrain from doing something, and applies to future actions. A declaratory judgment states the existing legal rights in a controversy but does not, in itself, coerce any party to enjoin any

5. In order for a writ of mandamus to issue, a plaintiff must show that (1) the plaintiff has "a right to have the act performed, (2) the defendant is under a clear non-discretionary duty to perform the act requested, and (3) plaintiff has exhausted all other avenues of relief." *City of New York v. Heckler*, 742 F.2d 729, 739 (2d Cir.1984); *see also Caremark Therapeutic Services v. Thompson*, 244 F.Supp.2d 224, 228 (S.D.N.Y.2003). Plaintiffs have not shown, at this stage, that the Secretary is "under a clear non-discretionary duty" to continue processing two-step loan reconsolidations through June 30, 2006. *Heckler*, 742 F.2d at 739.

future action." *Ulstein Marine, Ltd. v. United States,* 833 F.2d 1052, 1055 (1st Cir.1987); *see also Student Loan Marketing Ass'n v. Riley,* 907 F.Supp. 464, 474 (D.D.C.1995) (collecting cases allowing declaratory relief under anti-injunction clauses); *Calise Beauty School Inc. v. Riley,* 941 F.Supp. 425, 430 (S.D.N.Y.1996) (noting that declaratory relief may be available even where an injunction is prohibited by anti-injunction clause).

The issues here are whether the Defendants prevail on their motion to dismiss and whether Plaintiffs prevail upon summary judgment. The answer to both inquires is respectfully "No."

Defendants argue that Dear Colleague Letter FP 06-03 reflects longstanding policy concerning the Single Holder Rule, and that the DRA "did not contain provisions eliminating or narrowing the Single Holder Rule." (Def. Mem. at 6.) Defendants further argue that the "Department's interpretation of the [Single Holder Rule] should be upheld so long as 'it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent. (Def. Mem. at 17, quoting *Rust v. Sullivan,* 500 U.S. 173, 184 (1991).

Plaintiffs argue that the "Congressionally set date of July 1, 2006 for implementation of DRA's student finance provisions circumscribed any putative discretion of the Department in regulating [two step loan reconsolidation]" and that FP-06-03 "is thus at odds with the express terms of the DRA." (Pl. Mem. at 12-13.) Plaintiffs argue further that FP 06-03 violated the Administrative Procedure Act ("APA"),

5 U.S.C. § 553 (" § 553"), which "mandates that an agency follow certain procedures to make new rules" when "an agency's announcement 'changed existing rights and obligations." ' (Pl. Mem. at 13.) Plaintiffs also contend that, irrespective of § 553, the Department's policy stated in FP 06-03 was arbitrary and capricious. (Pl. Mem. 14.)

"In reviewing [an] agency's explanation of its actions, [the Court] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994) (citation omitted). "An agency action would be set aside under this standard if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

Here, there exist in the Court's view as yet unresolved disputed material issues of fact. Among other things, there are factual questions about the circumstances surrounding the adoption of FP 06-03; prior (pre FP 06-03) Department policy; whether the Secretary acted in an arbitrary and capricious manner as Plaintiffs allege; what notice was given and/or required; what factors were considered by the Secretary; and whether "since 1997 the Department of Education has processed the Loan Verification Certificates necessary to consolidate Direct education loans, including Direct consolidation loans into FFEL

consolidation loans." (Pl. Stmt ¶ 1-2; Def. Stmt ¶ 1-2.)[6] Summary judgment is, therefore, inappropriate at this time because (limited and appropriate) discovery is necessary to resolve factual issues.[7] *See Celotex,* 477 U.S. at 322.

At the same time, with regard to the propriety of Dear Colleague Letter FP 06-03, and the Department's decision-making process leading up to its publication, Defendants have not demonstrated, "beyond doubt that the plaintiff [s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Smith,* 219 F.3d at 240. Dismissal is, therefore, inappropriate. *See Sweet v. Sheahan,* 235 F.3d 80, 83 (2d Cir. 2000); *See also Chevron U.S.A., Inc. v. Nat'l Res. Def. Council,* 467 U.S. 837, 865 (1984); *Michel v. INS,* 206 F.3d 253, 263 (2d Cir. 2000).

Finally, Defendants' argue that Plaintiff OneSimpleLoan is without standing to seek relief under Count I because "the FFEL program protects the interest of students and their parents who desire to obtain loans for higher education." (Pl. Mem. at 20.) Plaintiffs counter that the APA "grants standing

6. The parties also dispute whether the March 24, 2006 e-mail sent by Pamela Moran, which stated that "if the borrower has no FFEL loans, they can consolidate with any FFEL lender because the single holder rule would not apply," was an official statement of the Department. (Def. Stmt ¶ 7; Pl. Stmt. ¶ 7; Witmeyer Dec. 5/11/06, Ex. A.)

7. *See Marisol v. Giuliani,* 1998 WL 132810 (S.D.N.Y.1998) (discussing the Second Circuit standard for taking depositions of high ranking government officials) (collecting cases).

to all who are 'likely to be financially injured' by an agency decision." (Pl. Mem. at 6, quoting *Data Processing Svc. v. Camp*, 397 U.S. 150, 154 (1970).) The statutory language of the APA states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Additional discovery about the business and operations of OneSimpleLoan would be helpful to assess its standing.[8]

B) Count II

Defendants argue that "if the Court finds . . . that the Department has properly barred Plaintiffs' two-step refinancing under the law as it existed prior to the DRA, then Plaintiffs will lack standing to pursue Count II." (Pl. Mem. at 21.) That is, if the Department "has properly prevented Plaintiffs from pursuing two-step refinancing under the prior law, then the additional restrictions adopted by the DRA are not the cause of Plaintiffs' alleged injury. . . ." (Pl. Mem. at 21.) Defendants argue, in the alternative, that Plaintiffs' claim under Count II should be dismissed pursuant to the Enrolled Bill Rule announced in *Field v. Clark*, 143 U.S. 649 (1892). (Def. Mem. at 21-22.)[9]

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8. OneSimpleLoan may have been "adversely affected or aggrieved" by the Defendants actions, and may (subject to what discovery reveals) have standing to pursue relief under Count I. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-154 (1970).

9. The Enrolled Bill Rule states:

> The signing by the speaker of the house of representatives, and by the president of the

(Cont'd)

Appendix C

Plaintiffs counter that they have standing to litigate Count II even if the Defendants were to prevail on Count I, because "the DRA imposes a punitive regime whereby a lender suffers a financial penalty if it offers a rate lower than the maximum interest rate." (Pl. Reply at 7.). Plaintiffs also contend that the Supreme Court's precedent in *Field* does not apply because the Enrolled Bill Rule is *dicta*, and "has no stare decisis effect." (Reply at 8.) Plaintiffs rely upon *United States v. Munoz Flores*, 495 U.S. 385 (1998), in which the Supreme Court stated (in a footnote) that "where, as here, a constitutional

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(Cont'd)

> senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses, through their presiding officers, to the president, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable . . . The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act so authenticated, is in conformity with the constitution.

Field, 143 U.S. at 672.

provision is implicated, *Field* does not apply." (Reply at 9; quoting *Munoz-Flores*, 495 U.S. at 391 n. 1.)[10]

1) Standing

"The irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in factan invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal citations and quotations omitted.)

Assuming, without deciding, that Plaintiffs may have suffered "an injury in fact," it does not necessarily follow that Plaintiffs' "injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. If the DRA were held unconstitutional, Congress might not choose to change the restrictions allegedly placed on the two-step loan reconsolidation process or lower interest rates on FFEL loans. It may be equally probable that Congress would resolve the

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10. In *Munoz-Flores*, the Supreme Court held that a bill establishing a monetary "special assessment" upon convicted criminal defendants was not a revenue raising bill within the meaning of the Origination Clause of the Constitution.

Medicare equipment discrepancy (i.e., 13 versus 36 months) and pass an otherwise identical bill.

2) The Enrolled Bill Rule

And, assuming, *arguendo,* that Plaintiffs can demonstrate standing to pursue Count II, Count II is subject to dismissal under the Enrolled Bill Rule announced in *Field v. Clark.* Despite Plaintiffs' assertion to the contrary, the Supreme Court appears to have restated its holding in *Field,* by acknowledging in 1988 that "the Constitution left it to Congress to determine how a bill is authenticated as having passed." *U.S. v. Munoz-Flores,* 495 U . S. 385, 391 n. 4 (1988). Although Plaintiffs argue that *Munoz-Flores* "directly confronted the effect of *Field,"* this Court must "leave to the Supreme Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson / American Exp., Inc.,* 490 U.S. 477, 484 (1989). *See also, Agostini v. Felton,* 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

Plaintiffs' contention that the Enrolled Bill Rule is mere *dicta* is belied by decisions of the United States Court of Appeals for the Second Circuit. For example, in *United States v. Pabon-Cruz,* 391 F.3d 86, 99 (2d Cir. 2004) the Court (16 years after *Munoz-Flores*) described the Enrolled Bill Rule as "a longstanding rule, invoked by many courts, including the Supreme Court and our own Court." *See also, U.S. v. Sitka,* 845 F.2d 43, 46 (2d Cir. 1988) ("Under [the enrolled bill rule] if a legislative document is authenticated in regular form by the appropriate officials, the courts

treat that document as properly adopted.") (quoting *U.S. v. Thomas*, 788 F.2d 1250, 1253 (7th Cir.1986)).

V. Decision & Order

For the reasons stated, Plaintiffs' claims under Count I, insofar as they seek injunctive relief, or (injunctive) relief "in the nature of a mandamus," are dismissed, and Plaintiffs' motion for a preliminary injunction is denied. As to Plaintiffs' claims under Count I for declaratory relief and for relief under the APA, both Defendants' motion to dismiss and Plaintiffs' motion for summary judgment are denied. As to Count II, Defendants' Motion to Dismiss is granted.

The parties are directed to appear at a status/discovery/settlement conference with the Court on June 14, 2006 at 10:45 a.m. in Courtroom 14(A) of the United States Courthouse located at 500 Pearl Street, New York, New York, 10007 to conclude a case management plan. **The parties are requested to engage in good faith settlement discussions prior to the conference.**

Dated: New York, NY
June 9, 2006

s/ RMB
RICHARD M. BERMAN, U.S.D.J.